DOCKET

No. 07-552

Title:	Sprint Communications Company, L.P., et al., Petitioners v. APCC Services, Inc., et al.
Docketed:	October 26, 2007
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Nos.:	(04-7034, 04-7035)
Decision Date:	June 8, 2007
Rehearing Denied:	August 7, 2007

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 25 2007	Petition for a writ of certiorari filed. (Response due November 26, 2007)
Oct 26 2007	Waiver of right of respondents APCC Services, Inc., et al. to respond filed.
Oct 31 2007	DISTRIBUTED for Conference of November 20, 2007.
Nov 2 2007	Response Requested . (Due December 3, 2007)
Nov 27 2007	Order extending time to file response to petition to and including December 7, 2007.
Dec 3 2007	Brief amicus curiae of Qwest Communications Corporation filed.
Dec 7 2007	Brief of respondents APCC Services, Inc., et al. in opposition filed.
Dec 12 2007	DISTRIBUTED for Conference of January 4, 2008.
Dec 12 2007	Reply of petitioners Sprint Communications Company, L.P., et al. filed. (Distributed).
Jan 4 2008	Petition GRANTED. The brief of petitioners is to be filed on or before Thursday, February 14, 2008. The brief of respondents is to be filed on or before Wednesday, March 12, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Jan 30 2008	SET FOR ARGUMENT ON Monday, April 21, 2008.
Feb 6 2008	Record received from U.S.C.A. for the District of Columbia Circuit. (1 box)
Feb 14 2008	Brief of petitioners Sprint Communications Company L.P., et al. filed.
Feb 14 2008	Joint appendix filed. (Statement of costs received).
Feb 21 2008	Brief amicus curiae of Network IP, LLC and Network Enhanced Telecom, LLP filed.
Feb 21 2008	Brief amicus curiae of Qwest Communications Corporation filed.
Mar 5 2008	CIRCULATED.
Mar 12 2008	Brief of respondents APCC Services, Inc., et al. filed. (Distributed)
Apr 9 2008	Reply of petitioners Sprint Communications Company, L.P., et al. filed. (Distributed)
Apr 21 2008	Argued. For petitioner: Carter G. Phillips, Washington, D.C. For respondents: Roy T. Englert, Jr., Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

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No. 07-___ 07-552

In The Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P. & AT&T CORP.,

Petitioners,

v.

APCC SERVICES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal regulations require petitioner telephone companies to make certain payments to the owners of payphones ("payphone service providers" or "PSPs"). This case arises from the PSPs' assignments to other companies – respondents here – of the right to litigate their dispute with petitioners over the amount of compensation. After the PSPs assigned their claims to respondents "for purposes of collection" and agreed to finance the litigation, respondents sued petitioners "on behalf of" the PSPs. Under the assignments, respondents can gain or lose nothing from the outcome of the case because all the proceeds will go to the PSPs. A divided panel of the D.C. Circuit nonetheless held that respondents have standing to sue petitioners.

The question presented is:

Whether the assignment of a claim "for purposes of collection" confers standing on assignees which have no personal stake in the case and which avowedly litigate only "on behalf of" the assignors.

PARTIES TO THE PROCEEDING

Petitioners are Sprint Communications Company L.P. and AT&T Corp.

Respondents are APCC Services, Inc.; Data Net Systems, L.L.C.; Davel Communications Group, Inc.; Jaroth, Inc., d/b/a Pacific Telemanagement Service; NSC Telemanagement Corp., n/k/a Intera Communications Corporation; and Peoples Telephone Co.

RULE 29.6 DISCLOSURES

The shares of petitioner AT&T Corp. ("AT&T") are 100 percent owned by AT&T, Inc. AT&T, Inc. has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Petitioner Sprint Communications Company, L.P. ("Sprint") is a wholly owned subsidiary of Sprint Nextel Corporation. Sprint Nextel Corporation has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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The district court's order denying petitioners' motion to dismiss (App. 83-106) is reported at 281 F. Supp. 2d 41. The district court's orders denying petitioners' motions for reconsideration and granting petitioners' requests for certification of interlocutory appeals (App. 45-63 and 64-82) are reported at 297 F. Supp. 2d 90 and 297 F. Supp. 2d 101. The D.C. Circuit's initial opinion (App. 4-41) is reported at 418 F.3d 1238. The D.C. Circuit's subsequent opinion (App. 1-3) is reported at 489 F.3d 1249.

JURISDICTION

The order of the D.C. Circuit denying petitioners' timely request for rehearing and rehearing en banc (App. 111-12) was entered on August 7, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the United States Constitution provides that the federal judicial power is limited to "Cases . . . [and] Controversies."

STATEMENT OF THE CASE

Payphone service providers assigned their claims against petitioner long-distance companies to respondents "for purposes of collection." The assignees have no stake in the outcome of the case because any proceeds will go to their assignors. A divided panel of the D.C. Circuit nonetheless held that respondents have Article III standing to sue petitioners "on behalf of" the assignors.

1. Petitioners AT&T and Sprint are long-distance telephone companies. App. 5. Regulations issued by the Federal Communications Commission (FCC) require petitioners to compensate payphone operators (payphone service providers or PSPs) for "dial around calls." In a dial around call, a payphone customer uses the phone to access a less expensive long-distance service than the PSP had previously established for use with that phone. To compensate PSPs for revenue they lose as a result of dial around calls, the FCC has issued a series of orders giving the PSPs a right to compensation from long-distance telephone companies. *See generally Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1518 (2007).

This case arises out of a dispute over the amount of money that petitioners owe the PSPs under the FCC regulations. The suit, however, was brought not by the PSPs themselves, but by third-party companies known as "aggregators." App. 7. Aggregators are intermediaries that have traditionally been hired by

the PSPs to collect the dial around compensation from long-distance companies and distribute them to the PSPs. *Id.* The PSPs pay the aggregators a fee for this service based on the number of payphone lines the PSP operates. *Id.*

In early 1999, the PSPs took the position that petitioners were substantially underpaying dial around compensation. App. 7, 122. But rather than litigate the dispute themselves, the PSPs arranged for the aggregators to do so on their behalf. App. 7. The terms of this scheme are exemplified by contracts between hundreds of PSPs and respondent APCC Services, Inc. (APCCS), which is the nation's largest aggregator. *Id.*

The PSPs assigned their dial around compensation claims to the aggregators "for purposes of collection," App. 8, 114, specifying: "This will allow APCCS to prosecute the litigation on your behalf. If at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose." App. 127. The PSPs fund the litigation through "a quarterly assessment of their dial around compensation on a per call basis." App. 125. "If a PSP refuses to permit the [per call surcharge for the litigation] or withdraws his/her agreement to allow these deductions prior to conclusion of the suits, APCCS will drop that PSP from the plaintiff's list and will have no obligation to represent the PSP in the collection of these claims." App. 126.

The aggregators are not allowed to pursue the case as they see fit and in their own interests.

Instead, their authority is sharply limited. The PSPs named APCCS their "attorney in fact" to litigate "on behalf of" the PSPs, App. 8, 115, and, if appropriate, to enter into settlements "on behalf of" the PSPs. App. 115. *See also* App. 117 ("APCCS wishes to act as [the] PSP's exclusive agent for resolving DAC claims."). The PSPs, in turn, purport to be bound by the outcome of the litigation only to the extent the suit is "prosecuted by APCCS in the [PSPs'] interest." App. 115. APCCS is required to act "reasonabl[y]" and "on behalf of PSP[s]." App. 118. *See also* App. 117 (APCCS may take "such action as it deems reasonably necessary and appropriate * * * , which may include collective legal action"); App. 118 (PSPs bound by "reasonable determinations"); *id.* (settlement is authorized within "reasonable exercise of [APCCS's] discretion").

The aggregators themselves stand to gain or lose nothing from the lawsuit, no matter how it is resolved. They are the named plaintiffs only because "the parties recognize the efficiencies of APCCS taking collective action on behalf of [the] PSP[s]." App. 117. APCCS has no stake in the outcome: all the actual proceeds from any eventual judgment against petitioners will go to the PSPs. App. 7, 9-10. Alternatively, if the case is instead settled, "each [PSP] will receive dial around compensation settlements on a per call basis"; and "should legal fees and expenses also be awarded, they will be returned to" the PSPs. App. 124-25; *see also* App. 120.

2. APCCS and the other respondent aggregators sued petitioners to recover the dial around compensation allegedly owed to the PSPs. Their complaint explains that they seek to litigate not in their own interests but "on behalf of hundreds of entities that own and operate over 400,000 public payphones located throughout the United States." Amended Compl., No. 1:99CV00696, *APCC Servs., Inc. et al. v. AT&T Corp.* ¶ 1.

Petitioners moved to dismiss on the ground that the aggregators lack standing to pursue the PSPs' dial around claims.[1] The district court initially agreed and dismissed the aggregators' suit. App. 83, 89. But on respondents' motion for reconsideration, the court reversed itself, concluding that it was sufficient for Article III purposes that "the assignment transfers legal title to the claim [rather than] merely transfer[ing] a power of attorney." App. 94. The district court subsequently ruled that a private right of action existed to enforce the relevant FCC regulations. App. 46, 65, 107-08.

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[1] The suits were brought by respondent aggregators and a single PSP (Peoples Telephone Company). App. 8. Almost all of the claims are brought by aggregators on behalf of third-party PSPs. Petitioners challenge the standing of all the respondent aggregators, including two that claim standing as well on the basis of their ownership interest in individual non-party PSPs. App. 10 n.**. Petitioners do not dispute the standing of the one respondent PSP in the case to vindicate its own interests under the FCC regulations.

The district court certified its standing and right of action rulings for interlocutory appeal under 28 U.S.C. § 1292(b). App. 63, 81. The D.C. Circuit granted the petitions for interlocutory appeal, App. 43, and reversed the district court. As further detailed *infra*, the court of appeals agreed that respondents have standing. App. 5. It also held that no right of action existed. *Id.*

This Court subsequently vacated and remanded the court of appeals' right of action ruling for reconsideration in light of *Global Crossing*, *supra*, which held that PSPs have the right to bring suit under Sections 201 and 207 of the Communications Act. *APCC Services, Inc. v. Sprint Communications Co. L.P.*, 127 S. Ct. 2094 (2007). On remand, the court of appeals held that, in light of *Global Crossing*, respondents have a private right of action to enforce the FCC's dial around compensation regulations. It accordingly remanded the case to the district court. App. 3. The court of appeals denied petitioners' request for rehearing and rehearing en banc. App. 111-12.

3. This petition concerns the ruling of the court of appeals in its initial opinion – by a divided vote – that respondents have Article III standing. The panel majority held that the assignments "give the aggregators standing to sue" if they "transfer the PSPs' compensation claims to the aggregators." App. 11. Applying that supposition, the majority deemed it sufficient as a matter of law that the assignments "transfer to the assignees the entire interest of the PSPs in their dial-around compensation claims." App. 14.

The court reasoned in two steps. First, it determined the legal effect of the assignments, which it read to embody "a complete transfer to the aggregator of the PSP's dial-around compensation claim." App. 12. The fact that all the benefits would go to the PSPs did not affect the assignments' legal consequence, but was "a mere reflection of the aggregator's promise to pass back to the PSP whatever it is able to collect." *Id.*

Second, the court of appeals addressed petitioners' argument that, even assuming that the assignments formally transfer the PSPs' legal claims and injury, "the aggregators lack standing because the assignments effectively give them only the right to sue; the aggregators will reap no direct benefit from the suit." App. 13. The majority rejected that argument because it found as a matter of law that the assignment of the legal right to bring a claim confers on the assignee a sufficient "personal stake" in the case to satisfy Article III. App. 16. The majority cited no Article III authority for that critical proposition, but reasoned that it was "not entirely without guidance" because "the identical issue has arisen under Federal Rule of Civil Procedure 17(a)," which requires that every suit be prosecuted by the "real party in interest." App. 15. Lower court decisions, the majority noted, hold under Rule 17(a) that "if an assignment properly transfers ownership of a claim, then the assignee's interest 'is not affected by the parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought

on the claim.'" *Id.* (quoting *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997)).

4. Judge Sentelle dissented on the ground that the assignments do not confer standing to sue. App. 28-35. In his view, even if the assignments transferred to respondents the PSPs' injury in fact, "the aggregators do not have [the] concrete private interest in the outcome of this suit" required by Article III. App. 28. Judge Sentelle did not doubt that the PSPs had transferred their legal claims – both the right and the injury – to the aggregators or that "the party that actually suffered the injury in the first instance need not be the party to bring suit." App. 29. But he recognized that Article III imposes a further requirement: "Only an assignment that gives the assignee *an actual interest in the recovery* is sufficient for standing." *Id.* (emphasis added). *See also id.* ("The assignee standing doctrine recognized by the Supreme Court * * * clearly refers to an actual assignment of an interest that secures a portion of the recovery.").

Judge Sentelle found decisive that, in this case, the aggregators will take nothing – hence, "the PSPs, not the aggregators, would be the only plaintiffs with a real stake in the outcome of this controversy." App. 28-29. Indeed, "the putative plaintiffs themselves recognize that the PSPs' assignment of rights to aggregators such as APCC gives them no share in the recovery." App. 32. Moreover, the aggregators have agreed to act "on behalf of" the PSPs. App. 33. "Where the 'assignment' relationship is in substance

a mere 'agency' relationship such that the 'assignee' enjoys no right to keep a part of the recovery, the irreducible constitutional minimum of standing is left unsatisfied." App. 31-32.

REASONS FOR GRANTING THE WRIT

Article III of the Constitution enforces the "tripartite allocation of power set forth in the Constitution," confining the exercise of judicial authority to the resolution of actual "Cases" and "Controversies," U.S. Const. art. III, § 2. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1860-61 (2006). One "essential and unchanging" component of the case-or-controversy requirement is the rule that the plaintiff invoking the jurisdiction of the federal courts must have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" requires that (i) the plaintiff "have suffered an 'injury in fact'" to its own "legally protected interest" that is both "concrete and particularized"; (b) there be a "causal connection between the injury and the conduct complained of" such that the alleged injury to the plaintiff is "fairly * * * trace[able] to the challenged action of the defendant"; and (c) it be "likely" that the plaintiff's "injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61 & n.1 (citations omitted).

Before the PSPs and respondents entered into the assignments in this case, respondents plainly

lacked the individual legal interest required to sue petitioners. The legal obligation under the FCC dial around compensation regulations and the asserted damages for the alleged violations of those regulations run from petitioners only to the PSPs. Respondents are entitled to absolutely nothing under the FCC's regulations, and in litigation they would have nothing to gain. The PSPs are moreover perfectly capable of litigating on their own behalf, as is clear from the presence of one PSP in this very case, App. 8, and the fact that a PSP brought the similar suit in *Global Crossing*, *supra*.

It is likewise clear that standing would be lacking if the PSPs purported to assign respondents only their right to bring suit, without transferring legal title to the PSPs' claims. In that instance as well, respondents could not sue in federal court because they would have no claims of their own and would have suffered no injury. *See Woodside v. Beckham*, 216 U.S. 117 (1910).

The question presented by this case is whether there is a different outcome under Article III when the PSPs authorize respondents to litigate on their behalf and merely formally "assign" their claims to respondents "for purposes of collection," yet under the assignments the substance of the rights and obligations remain exactly the same – *viz.*, respondents litigate "on behalf of" the PSPs, to which all the benefits of the lawsuit still flow. The plain and obvious answer to that question before the D.C. Circuit's ruling in this case was "no." Substance controls over

form when it comes to Article III standing. Respondents no more hold the required concrete personal stake in the litigation after this nominal assignment than before it.

The court of appeals' contrary holding cannot be reconciled with this Court's decisions and conflicts with the rulings of other courts of appeals. Further, this ruling permits a sweeping lawsuit on behalf of more than a thousand companies nationwide to go forward with plaintiffs at the helm who have no individual claims to pursue or any individual stake in the outcome of the case. The ruling below is such a profound departure from established Article III standing principles that this Court's review is warranted and, indeed, summary reversal may be appropriate.

I. The Decision Below Conflicts with Basic Tenets of This Court's Standing Jurisprudence.

The D.C. Circuit held in this case that respondents possess standing as a result of the assignments they received from the individual PSPs. App. 9-16. The panel majority deemed it sufficient as a matter of law that the PSPs transferred formal legal title to their claims – including the right to assert the PSPs' injuries – to respondents. It expressly held that it was "irrelevant" whether – under those very same assignments – respondents stood to gain in any respect from the case. App. 16. That holding conflicts with

bedrock principles of this Court's Article III standing jurisprudence.

A. The D.C. Circuit Impermissibly Deemed It "Irrelevant" that the Assignees Lack Any Personal Stake in this Case.

Certiorari is warranted because the ruling below flies in the face of the very purpose of the standing inquiry set forth in this Court's Article III standing decisions. "Although [this Court] ha[s] packaged the requirements of constitutional 'case' or 'controversy' somewhat differently in the past 25 years – an era rich in three-part tests – the point has always been the same: whether [the] plaintiff '*personally would benefit in a tangible way* from the court's intervention'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1974)) (emphasis added). That requirement is embodied in an uninterrupted line of this Court's decisions mandating that plaintiffs demonstrate that they have themselves suffered a redressable injury in fact that provides them with a concrete stake in the outcome of the litigation.

1. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), an environmental group sued to prevent the issuance of a permit authorizing a skiing development. This Court found that the plaintiff lacked standing because it did not contend that it would be directly affected by the development. "[T]he 'injury in fact' test requires more than an injury to a cognizable

interest. It requires that the party seeking review be himself among the injured." *Id.* at 734-35. This Court rejected the plaintiff's invitation to "abandon[] the requirement that the party seeking review must himself have suffered an injury." *Id.* at 738.

In *Warth v. Seldin*, individual plaintiffs brought suit to challenge a town's allegedly exclusionary zoning policies. This Court found that the plaintiffs lacked standing because they could not establish that they personally had been injured by the challenged policies. The Court held:

> The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . . ."

422 U.S. at 499 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)). *See also id.* at 502 ("[p]etitioners must allege and show that they personally have been injured"). Under Article III, a plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention." *Id.* at 508 (emphasis in original).

Likewise, in *Lujan*, *supra*, the Court held that a plaintiff which would not itself be "directly affected" by the challenged conduct may not sue to vindicate the interests of others. 504 U.S. at 563 (quoting *Morton*, 405 U.S. at 735). Accordingly, an environmental group lacked standing to challenge an administrative rule interpreting the Endangered Species Act because, while the rule would increase the rate of overseas extinction, the plaintiff did not allege that it would be directly affected as a consequence. *Id.*

Most recently, in *Steel Co. v. Citizens for a Better Env't*, *supra*, an environmental group filed a citizen suit alleging that the defendant manufacturer had violated federal law by failing to file timely reports regarding hazardous substances. This Court assumed that the "failure to provide [the] information in a timely fashion, and the lingering effects of that failure," constituted a cognizable injury in fact. 523 U.S. at 105. But it held that the plaintiff's request for statutory penalties did not confer Article III standing because the plaintiff itself lacked a personal stake in the outcome: "These penalties – the only damages authorized by [the statute] – are payable to the United States Treasury." *Id.* at 106. *See also id.* at 110 (O'Connor, J., concurring, joined by Kennedy, J.) ("I agree that our precedent supports the Court's holding that respondent lacks Article III standing because its injuries cannot be redressed by a judgment that would, in effect, require only the payment of penalties to the United States Treasury.").

2. The D.C. Circuit's ruling in this case negates the requirement that the plaintiff show an injury to its own legally protected interests. It held that standing arises merely from the fact that the PSPs assigned respondents their claims and hence the right to assert their injuries. The D.C. Circuit's view that "[w]hat the aggregators have promised to do with any recovery is irrelevant to their standing," App. 16, avowedly deems the *plaintiffs' own interest* in the outcome of their case inconsequential to the standing inquiry. The D.C. Circuit thus found standing even though respondents have suffered no harm, have no legal or equitable entitlement to the recovery in "their" case, and have no autonomy to decide how to dispose of any proceeds. Respondents have never held a legal interest in a judgment against petitioners; the PSPs held the right to that money as much after the "assignment" as before it.

Although the assignments transfer the right to collect the dial around compensation, the *same agreements* by their terms specifically withhold from respondents the right to take any of the proceeds; every penny of any judgment, attorney's fees award, or award of costs goes to the PSPs. In the analogous context of inquiring whether an assignment was impermissibly intended to defeat diversity jurisdiction, this Court has looked to the practical effect of the agreement as a whole. *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969); *see also Bernards Twp. v. Stebbins*, 109 U.S. 341 (1883) (holding that

assignment for collection to diverse plaintiff insufficient for purposes of establishing diversity jurisdiction).

Review is thus warranted because the D.C. Circuit has "abandon[ed] the requirement that the party seeking review must himself have suffered an injury." *Morton*, 405 U.S. at 738. APCCS does not "allege a distinct and palpable injury to [it]self," *Warth*, 422 U.S. at 501, and any judgment will be "worthless to respondent[s]," *Steel Co.*, 523 U.S. at 106. Under Article III, a legal claim must be presented by a party "whose interests entitle him to raise it." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1982). *Cf. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2008 n.3 (2007) (Scalia, J., concurring in relevant part) ("Because the rights to reimbursement and to the various procedural protections are accorded to parents themselves, they are 'parties aggrieved' when those rights are infringed, and may accordingly proceed *pro se* when seeking to vindicate them. * * * Of course when parents assert procedural violations, they must also allege those violations adversely affected the outcome of the proceedings. Under Article III, one does not have standing to challenge a procedural violation without having some concrete interest in the outcome of the proceeding to which the violation pertains, see *Lujan* * * * , here the parents' interest in having their child receive an appropriate education.").

3. The court of appeals' exclusive reliance on the legal right to sue that respondents received from the PSPs separately conflicts with this Court's precedents by displacing the foundational Article III requirement that there be "'concrete adverseness'" between the parties. Sufficient adversity exists only when "proceedings [are] commenced by one who has been injured in fact." *Valley Forge*, 454 U.S. at 486 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In this case, the only concrete adverseness in interests is between petitioners and the PSPs. Respondents make no argument that petitioners violated any legal obligation as to them, nor that the court can provide respondents themselves any relief.

Equally troubling, even assuming respondents received the PSPs' claim and the right to pursue the PSPs' injury in fact, respondents clearly are not litigating in their own interests, except to the extent those interests coincidentally align with those of the PSPs. Respondents avowedly are pursuing the PSPs' legal interests rather than their own and bring this suit as a conduit into court for the PSPs' legal claims. The contracts appoint respondents as the PSPs' "attorney in fact" to litigate "on behalf of" the PSPs in the first instance, and if appropriate, to later settle the case "on behalf of" the PSPs. App. 114-21. The contracts furthermore require that this case be

"prosecut[ed]" by APCCS "in the [PSPs'] interest," not respondents. App. 115.[2]

A simple hypothetical demonstrates the point. Imagine that petitioners sought to settle with respondents through a generous cash payment exclusively for the use of the named plaintiffs. A party with genuine control over the outcome of its own case would obviously be able to resolve its own case on those terms. But respondents cannot. As a consequence, there is a distinct lack of adversity between petitioners and respondents.

In sum, if the D.C. Circuit's decision stands, the bedrock Article III requirements that the plaintiff have a personal stake in the action and demonstrate concrete adversity will in many cases be dead letters. The court of appeals' ruling does not rest in any respect upon any feature of the FCC's dial around compensation regulations. Instead, the court broadly held as a matter of law that Article III permits any person with a claim to nominally "assign" that claim to a third party to litigate a suit in which it has no interest whatsoever, and which it must pursue "on behalf of" the injured party – which will receive all of the proceeds. Such an extraordinary departure from basic jurisdictional principles requires this Court's review.

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[2] Even then, APCCS lacks plenary authority, for the PSPs can later challenge its conduct of the litigation as unreasonable, a scenario that is far from hypothetical if APCCS loses the case. App. 116-17. If that challenge succeeds, the PSPs assertedly would not be bound by the outcome of the case. App. 115.

B. This Court's Decisions Preclude the D.C. Circuit's Holding that an Assignment "for Purposes of Collection" Confers Standing Notwithstanding that the Assignee Has No Personal Stake in the Case.

1. In nonetheless holding that respondents have standing, the court of appeals cited the general proposition that assignees have the right to sue consistent with Article III. App. 10-11. But as Judge Sentelle aptly noted, "[t]here are 'assignments,' and then there are assignments." App. 29. A genuine assignment involves the transfer of not only (a) a legal claim, but also (b) the right to the proceeds. "Only an assignment that gives the assignee an actual interest in the recovery is sufficient for standing." *Id.* If such an assignment had been utilized in this case, not only would petitioners' alleged failure to comply with the FCC dial around compensation regulations have harmed respondents' assigned legal interests, but also respondents would directly benefit from a judgment in their favor.

By contrast, this Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), confirms that an assignment as emptied of legal consequence as the one in this case does not confer Article III standing. *Vermont Agency* addressed the Article III standing of *qui tam* relators under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. This Court held that two elements of the relator's status were jointly critical to

the existence of Article III standing in that case. First, the FCA grants the relator "a share of any proceeds from the action * * * plus attorney's fees and costs." 529 U.S. at 769-70. Through this "portion of the recovery – the bounty he will receive if the suit is successful – a *qui tam* relator has a 'concrete private interest in the outcome of [the] suit.'" *Id.* at 772 (quoting *Lujan*, 504 U.S. at 573) (alteration in original). *Cf. id.* at 776-77 ("Like their English counterparts, some [early American statutes] provided both a bounty and an express cause of action; others provided a bounty only." (footnotes omitted)). Only after identifying the relator's personal stake did this Court turn to the question whether the relator had a "legally protected right" to vindicate in the case. *Id.* at 773. The Court held that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor" and concluded that the FCA "can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Id.*[3]

As Judge Sentelle observed, *Vermont Agency* recognized assignee standing, but – consistent with the unbroken line of precedents discussed *supra* – only with respect to "an actual assignment of an

[3] The Court's opinion reinforces the importance of both elements. The cases and statutes cited by the Court as reflecting a history of standing to sue for assignees and relators involve instances in which the plaintiff had not only the right to assert the injury to a third party but also its *own* tangible stake in the outcome of the case. *See* 529 U.S. at 773-78; App. 31 (Sentelle, J., dissenting).

interest that secures a portion of the recovery." App. 29. He correctly recognized that, "[u]nder *Vermont Agency* (consistent with its foundation, *Lujan*), an assignee plaintiff must both (1) seek to vindicate the injury to the assignor, and (2) hold an interest 'consisting of obtaining compensation for, or preventing, the violation of a legally protected right.'" App. 31 (quoting *Vermont Agency*, 529 U.S. at 772-73). The D.C. Circuit's ruling in this case cannot be reconciled with either element of this Court's decision in *Vermont Agency*.

Most obviously, respondents lack the first element of standing identified by this Court: they have no personal stake in the suit. Unlike a *qui tam* relator – which receives a bounty – respondents have no "concrete private interest in the outcome" of their case. No matter what happens in this litigation, respondents will take nothing. They will receive no part of any judgment or settlement, which (along with any award of attorney's fees or costs) will instead pass automatically to the PSPs. The D.C. Circuit's decision thus jettisons the Article III requirement recognized in *Vermont Agency* that, like any party who invokes the powers of the federal courts, an assignee has standing only if it stands to gain from the suit.

Nor, contrary to the ruling below, does a formalistic "assignment for collection" satisfy the second requirement articulated by *Vermont Agency*, which makes clear that the practical effect of an "assignment" is determinative of standing, not its form. The FCA does not formally "assign" any rights of the

United States to the relator. Rather, this Court looked to whether the statute could "reasonably be regarded" as conferring the "injury in fact" of the government upon the private plaintiff. 529 U.S. at 773.

On any fair application of the standard articulated in *Vermont Agency*, the "assignment" in this case is not comparable to the assignment to *qui tam* relators under the FCA, such that it could fairly be said to confer on respondents standing to assert the injury in fact of the PSPs. A *qui tam* relator litigates the case at least in part for his personal benefit. By contrast, in this case, the assignment from the PSPs is limited to the "purposes of collection" for the very reason of specifying that APCCS would "prosecute the litigation *on your [i.e., the PSPs'] behalf*." App. 127 (emphasis added). Respondents do not even have plenary control over their own case, which they instead must pursue "reasonably" and only in the interests of the PSPs. App. 116-21.

In the end, respondents are not true "assignees" as any other court would understand that term, because the contracts in this case establish a "mere 'agency' relationship" (App. 32 (Sentelle, J., dissenting)), which unquestionably is insufficient to confer Article III standing. *See Vermont Agency*, 529 U.S. at 772. The contracts expressly state that "APCCS wishes to act as [the] PSP's exclusive agent for resolving DAC claims." App. 117. Indeed, the PSPs are financing the entire cost of this litigation. Respondents no more have Article III standing than would an attorney who, retained to vindicate a client's interests,

sues in the attorney's own name rather than in the client's name.

2. The court of appeals principally rested its decision that respondents have standing not on this Court's Article III precedents, but instead on lower court rulings that a plaintiff remains a "real party in interest" under FRCP 17(a) notwithstanding that it incurs an obligation to pay the proceeds of the case to a third party. App. 15. The court of appeals' reliance on Rule 17(a) was seriously misguided and its reasoning may be disposed of easily.

Rule 17 is not a substitute or proxy for Article III. *E.g.*, *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528, 532 (6th Cir. 2002) ("Several other circuit courts have acknowledged that there is a distinction between questions of Article III standing and Rule 17(a) real party in interest objections." (collecting cases)). The Rule's principal role is to protect defendants from multiple lawsuits by ensuring that the first suit is brought by the correct plaintiff. *See* Rule 17 Adv. Comm. Notes.[4] It is black letter law that "several

[4] For example, Rule 17(a) incorporates state law rules governing the proper plaintiff to bring suit. *E.g.*, *Frank v. Hadesman & Frank*, 83 F.3d 158, 159 (7th Cir. 1996) (Easterbrook, J.) ("Frank's problem is not standing (in the sense that the complaint does not allege a 'case or controversy' justiciable under Article III) but the identity of the real party in interest. * * * Fed. R. Civ. P. 17(a). Does the claim belong to Frank personally, or to Hadesman & Frank, Inc.? That is a question of state law."); *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 243 (5th Cir. 1993) ("Of course, in addition to satisfying

(Continued on following page)

other elements of the standing doctrine are clearly unrelated to the rather simple proposition set out in Rule 17(a), and plaintiff must both be the real party in interest *and* have standing." 6A Wright et al., *Federal Practice and Procedure* § 1542, at 330 (2d ed. 1995) (emphasis added) (footnotes omitted). *See, e.g.*, *Davis v. Yageo Corp.*, 481 F.3d 661, 678 (9th Cir. 2007) ("[W]hether or not [plaintiff] was the real-party-in-interest, it does not have standing, and it cannot cure its standing problem through an invocation of Fed. R. Civ. P. 17(a)." (citing *Kent v. Northern Cal. Reg'l Office of the American Friends Serv. Comm.*, 497 F.2d 1325 (9th Cir. 1974)).

C. This Court's Precedents Require Dismissal in any Event on Prudential Standing Grounds.

Even if respondents possessed Article III standing, this suit should have been dismissed on prudential grounds. *See* Pet. C.A. Br. 40-45. Beyond the minimum constitutional requirements, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal

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Article III, Thomas must have the capacity to sue on behalf of SLT. *See* Fed. R. Civ. P. 17(a). * * * [C]ourts must look to the substantive law creating the right being sued upon to determine compliance with the real party in interest requirement * * * . (citation omitted). Because SLT is a Missouri trust, we look to Missouri law to determine Thomas's capacity to sue on its behalf.").

rights or interests of third parties." *Warth*, 422 U.S. at 499. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

Here, respondents are pursuing both a right and a cause of action that were created specifically for the PSPs and that the PSPs are fully capable of vindicating themselves. Not only do the governing regulations "order[] carriers to reimburse the *payphone operators*" (*Global Crossing*, 127 S. Ct. at 1518 (emphasis added)), but the FCC contemplated that it would be the "payphone operator [which would] bring a federal-court lawsuit * * * to collect the compensation owed." *Id.* This Court in turn sustained the FCC's position on the understanding that the FCC reasonably read the Communications Act to "authorize[] a payphone operator to bring a federal-court lawsuit against a recalcitrant carrier." *Id.* at 1516.[5]

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[5] This Court's precedents have also recognized that, in appropriate circumstances, an associational organization may have standing to bring claims on behalf of its members. This case does not implicate that principle, however, for multiple reasons: none of the respondent aggregators is such an organization; the PSPs are not members; and the PSPs are perfectly capable of litigating the case themselves. *See generally* App. 34-35 (Sentelle, J., dissenting).

II. The Ruling Below Conflicts with Decisions of Three Other Circuits.

1. Certiorari is also warranted because the D.C. Circuit's decision cannot be reconciled with the holdings of the Second and Eleventh Circuits that an assignee lacks Article III standing, notwithstanding its legal right to assert the injury of the assignor, if it nonetheless has no personal stake in the outcome of the case. In *Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110 (2d Cir.), *cert. denied*, 537 U.S. 878 (2002), the plaintiffs assigned to the State their entire "cause of action" under ERISA Section 502(a)(3), which provides a right to sue ERISA plans for equitable relief. Connecticut provided no consideration in return for the assignments and could obtain no recovery for the State itself in the litigation. 287 F.3d at 112 (citations omitted). As the court explained, although the assignments "transfer to the State any right of action for equitable relief," "[t]hey do not * * * confer 'actual' rights or benefits under ERISA on the State." 287 F.3d at 113. "And the assignments do not shift the loss suffered by individual enrollees from the alleged breach of such duty from the individuals to the State." *Id.*

The court explained that the case called on it to determine when an assignee has Article III standing "to assert the injury in fact suffered by the assignor." 287 F.3d at 117 (quoting *Vermont Agency*, 529 U.S. at 773). The court identified two such circumstances. First, "[t]ypically, the assignee, obtaining the assignment in exchange for some consideration running

from it to the assignor, replaces the assignor with respect to the claim or the portion of the claim assigned and thus stands in the assignor's stead with respect to both injury *and remedy*." *Id.* (emphasis added). It gave as an example that court's prior holding in *I.V. Services of America, Inc. v. Trustees of American Consulting Engineers Council Insurance Trust Fund*, 136 F.3d 114 (1998), that "a healthcare provider that spends money on behalf of a patient for drugs and in return receives an assignment of the patient's rights to reimbursement under the healthcare plan has standing." *Physicians Health Servs.*, 287 F.3d at 117. There, the plaintiff had a personalized stake in the case because "the injury – the unreimbursed cost of drugs prescribed for the assignor – was assumed by the assignee, and in return the right to seek redress for it passed from the patient to the provider under the assignment." 287 F.3d at 117.

Second, the court recognized that standing exists even when the assignment does not include the right to the remedy in the case, so long as the plaintiff has some other personal stake in the outcome. It cited as an example *Vermont Agency*, in which the relator "recover[s] a share of the proceeds from the action." 287 F.3d at 117.

The Second Circuit then compared the case before it with those two circumstances in which assignees have standing to assert the injuries in fact of their assignors:

> None of the remedies being sought would flow to the State as assignee. As the State puts it, "this case is brought *solely for the benefit of the assignors* and those similarly situated." Even if the assignments are valid as a contractual matter, they thus merely give the State the right to act as a nominal party. The State as an assignee therefore lacks standing under Article III of the Constitution.

Id. (citations omitted) (emphasis in original). The Second Circuit accordingly explained that "[t]he case before us differs critically from *Vermont Agency* and *I.V. Services*," because "[t]he *qui tam* relator in the former and the healthcare provider in the latter each had a 'concrete private interest in the outcome of [its] suit.'" 287 F.3d at 118 (quoting *Vermont Agency*, 529 U.S. at 772)). "That is, the outcome had the potential to affect the *qui tam* relator and healthcare provider in a 'personal and individual way': They both stood, personally and individually to recover a monetary award." *Id.* (citing the holding of *Lujan*, 504 U.S. at 560 & n.1, that "an 'injury in fact' must be 'particularized' and defining 'particularized' as affecting 'the plaintiff in a personal and individual way'"). By contrast, a plaintiff such as Connecticut, lacking a stake in the outcome, is in essentially the same shoes as a party who has "no concrete interest in the suit and only has a 'public interest in proper administration of the laws.'" *Id.* at 117 n.8 (quoting *Lujan*, 504 U.S. at 576). The court accordingly held that the case must be dismissed for lack of standing. *Id.* at 118.

In *Connecticut v. Health Net, Inc.*, 383 F.3d 1258 (2004), the Eleventh Circuit subsequently endorsed and adopted the Second Circuit's analysis in *Physicians Health Services*, holding on similar facts that Connecticut lacked standing to sue based on such assignments. The Eleventh Circuit held that the State "does not have standing to pursue its claims, as an assignee, under Article III" because it "failed to demonstrate that it has suffered or will suffer an actual or imminent invasion of a legally protected interest that is concrete and particularized." *Id.* at 1259. The court thus found determinative that "Connecticut does not contend that it has suffered any specific injury to itself." *Id.* at 1261. "[N]o evidence exists in the record to suggest that this assignment was supported by any consideration or that the State of Connecticut has suffered, or will suffer, any type of injury as a result of the practices it claims violate ERISA. It simply seeks to assert these claims *on behalf of* its citizens and for *their* sole benefit." *Id.* (emphases added). The Eleventh Circuit thus distinguished "cases in which this Court has recognized the standing of certain health care provider-assignees who assert ERISA claims," because "the provider-assignees in those cases were able to assert separate injuries" in the form of the damages they would receive through a judgment in the case. *Id.* at 1261 n.2.

The court of appeals' decision in this case squarely conflicts with the holdings of the Second and Eleventh Circuits. Both of those courts confronted

cases like this one, in which an assignee of a legal claim seeks to litigate "on behalf of" a third party, rather than for its own interests. Both courts squarely held that the transfer of the assignors' injury was itself insufficient to confer standing, ruling that the assignee must have not only a legal right of action, but also a particularized, individual stake in the outcome of the case. Those courts would hold that the assignments in this case merely give respondents "the right to act as a nominal party." *Physicians Health Servs.*, 287 F.3d at 117. In stark contrast, the D.C. Circuit held here that the PSPs' transfer of their claim and injury was sufficient to satisfy Article III. App. 14-15.

The majority below attempted to distinguish *Physicians Health Services* on the ground that "[t]he assignments at issue here * * * transfer to the assignees the entire interest of the PSPs in their dial-around compensation claims." App. 14. But that is no distinction at all. To the contrary, it is precisely the argument for standing that the Second Circuit – and later the Eleventh Circuit – rejected. The plan participants in *Physicians Health Services* transferred all their rights under ERISA Section 502(a)(3), and the court assumed the assignments were fully "valid as a contractual matter." 287 F.3d at 118. Indeed, the transfer there was *more* complete than the one in this case: Connecticut had the "right to control" the litigation, *id.*, whereas respondents are required to pursue the interests of the PSPs and to do so reasonably, *see*

supra at 4. The Second Circuit held that the essential missing element of the State's claim to standing was any personal and particularized stake in the outcome of the case. 287 F.3d at 118; *accord Health Net*, 383 F.3d at 1261. The D.C. Circuit was able to find standing here only because it eliminated that requirement entirely, deeming it sufficient as a matter of law that the assignments in this case "transfer the PSPs' compensation claims to the aggregators." App. 11.

2. Nor can the D.C. Circuit's decision be reconciled with the Ninth Circuit's decision in *Glanton v. AdvancePCS*, 465 F.3d 1123 (2006) (Kozinski, J.). In *Glanton*, plan participants sued the plan's administrator for allegedly violating ERISA by improperly retaining the cost savings it received on prescription drugs. Notwithstanding that ERISA granted the plaintiffs the right to sue on the plan's behalf, the Ninth Circuit held that the plaintiffs lacked Article III standing. The court explained that the plan participants had the statutory right to sue but nonetheless lacked any particularized "stake in the outcome" of the litigation because "ERISA gives plan beneficiaries nothing; any monetary recovery goes to the plans – as would the benefits of any injunctive relief." *Id.* at 1125-1126 & n.3. In so holding, the Ninth Circuit distinguished *qui tam* actions on the ground that *qui tam* relators are impliedly assigned a personal share in the recovery. The plaintiffs in *Glanton*, by contrast, "have been assigned no right to *any portion of the recovery*." *Id.* (emphasis added).

The D.C. Circuit's holding here was exactly the opposite. While the Ninth Circuit requires that a plaintiff have an individualized injury that will be remedied or redressed by the litigation, the D.C. Circuit found standing despite the lack of any individualized recovery or any individualized injury. Thus, had respondents filed suit in the Ninth Circuit, standing would have been denied because they will not receive any benefit in the case, no matter how it is resolved. They avowedly state that they sue "on behalf of" the PSPs, and not on behalf of any individualized interest or injury.

III. Review Is Warranted in Light of the Manifest Importance of the Case.

Both the D.C. Circuit's holding and the application of that holding in this case raise issues of significant ongoing importance to the federal courts and litigants, meriting this Court's intervention. Respondents' complaint alone involves the claims of "more than one thousand PSPs that own and operate over 400,000 public payphones throughout the United States." App. 85. The court of appeals' ruling that respondents may proceed with their suit on behalf of the PSPs raises the immediate prospect of the federal courts' adjudication of a genuinely massive number of

claims in contravention of the most basic requirements of Article III of the Constitution.[6]

More broadly, the D.C. Circuit's excessively permissive standing ruling is an open invitation to evade Article III through the commencement of similar complex litigation in the District of Columbia. Lawsuits like this one are generally filed by sophisticated counsel, knowledgeable in the rules of decisions of various jurisdictions, who do not hesitate to shop for the most favorable forum. Virtually any commercial claim that rests on a federal right of action may properly be filed in the District Court for the District of Columbia, because most companies have some operation that makes them "resident" in the District. *See* 28 U.S.C. § 1391(b) (providing that, in a non-diversity case, venue is appropriate in any "judicial district where any defendant resides, if all defendants reside in the same State"); *id.* § 1391(c) (providing that a corporation resides in "any judicial district in which it is subject to personal jurisdiction at the time

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[6] Under assignments to sue and collect on behalf of PSPs that are virtually identical to the assignments at issue here, APCCS and other aggregators have brought suit in the District of Columbia against another long-distance carrier, Qwest Communication Corporation ("Qwest"), seeking to recover dial around compensation allegedly owed by Qwest to PSPs. *APCC Services, Inc. v. Qwest Communications Corp.*, No. 1:01-cv-00641-ESH (D.D.C.). Under the D.C. Circuit's ruling in the actions against Sprint and AT&T, the suit against Qwest may proceed even though the aggregators have no stake in the outcome of that litigation either.

the action is commenced"). This case is a perfect example. Respondents have no particular ties to the District. They brought suit in that venue based solely on petitioners' commercial presence there. Equally important, federal law makes the D.C. District and D.C. Circuit the venue for challenges brought under a wide array of regulatory schemes. *See, e.g.*, 47 U.S.C. § 402(a) (telecommunications regulations issued by FCC); *id.* § 9613(a) (environmental regulations under CERCLA). In the wake of the D.C. Circuit's standing ruling in this case, parties are accordingly now free to adopt copycat "assignments" that interpose individual plaintiffs, with no personal stake in the outcome, at the helm of wide-ranging litigation in that forum.

The prospect of the District of Columbia becoming a magnet for lawsuits brought by assignees lacking a concrete interest in the suit's fate is heightened by the sheer fact that the use of assignments to sue is not uncommon. Until the D.C. Circuit's ruling in this case, however, no appellate court ever had equated the validity of an assignment to sue that confers *no stake in the outcome* with standing to sue: consistent with this Court's modern standing doctrine, the courts have instead demanded that the assignment furnish the assignee with more than just the barebones right to litigate. The D.C. Circuit's unprecedented decision threatens to transform the business practice of assigning the right to sue into a loophole to evade Article III strictures.

One further consequence of the court of appeals' decision is to call into question significant aspects of

federal class action practice, including particularly the utility of opt-in class actions. *See* App. 58 (district court certifying for appeal ruling that respondents have standing because, *inter alia*, petitioners "argue, with some persuasiveness, that this Court's ruling would allow parties to evade the requirements for class action certification set forth in Fed. R. Civ. P. 23"); *see also* App. 77. Indeed, this very case is in substance a class action on behalf of the PSPs, brought by a third party and without regard to Federal Rule of Civil Procedure 23. The ruling below would seemingly authorize large numbers of class members – indeed, the entire class – to nominally "assign" their claims to a single plaintiff, who would be paid for her services and obligated to return all the proceeds to all the individual class members. But all of the carefully calibrated procedural protections of the class action mechanism are absent in such a case. The nominal plaintiff need not be a class member *at all*, much less one whose claims are "typical." *Contra* Fed. R. Civ. P. 23(a). Nor would the plaintiff be required to satisfy the burden – established to protect both the court and the defendant – that the class action mechanism would be superior to the litigation of individual cases. *Contra* Fed. R. Civ. P. 23(b)(3).

In short, the broad jurisprudential and practical significance of the ruling below amplifies the significant bases for this Court's intervention in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed June 8, 2007

No. 04-7034

APCC SERVICES, INC., ET AL.,
APPELLEES

v.

SPRINT COMMUNICATIONS CO.,
APPELLANT

Consolidated with
04-7035

On Remand from the United States Supreme Court

Before: GINSBURG, *Chief Judge* and SENTELLE and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed PER CURIAM.

PER CURIAM: In *APCC Services, Inc. v. Sprint Communications Co.*, 418 F.3d 1238 (2005) (*APCC*), we reversed the orders of the district court denying the defendants' motion to dismiss. The Supreme Court granted the plaintiffs' petition for a writ of certiorari to this court, vacated our judgment, and remanded the case for further consideration in light

of *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 127 S.Ct. 1513 (2007). We now affirm the orders of, and remand the case to, the district court.

The facts of this case are set forth in our previous opinion. *APCC*, 418 F.3d at 1241-42. In brief, APCC et al. are a payphone service provider (PSP) and several "aggregators," intermediaries between PSPs and interexchange carriers (IXCs), that sued several IXCs to obtain compensation they claim the IXCs owe them pursuant to a regulation of the Federal Communications Commission. The IXCs moved to dismiss on the grounds that the aggregators did not have standing to sue and the Communications Act of 1934, 47 U.S.C. § 151 et seq., did not give the plaintiffs a private right of action to recover for a violation of the regulation. The district court denied the motions, concluding the aggregators had standing, *APCC Servs., Inc. v. AT & T Corp.*, 281 F. Supp. 2d 41, 45 (2003), and that § 276 of the Act created a private right of action. *APCC Servs., Inc. v. Cable & Wireless, Inc.*, 281 F. Supp. 2d 52, 54-57 (2003). The district court also permitted the plaintiffs to amend their complaint to assert that §§ 201(b), 407, and 416(c) of Title 47 provide alternate grounds for relief. *Id.* at 57-59. This court reversed. The panel determined, over the dissent of Judge Sentelle, that the aggregators had standing to sue and, over the dissent of Chief Judge Ginsburg, that none of the provisions cited gave the plaintiffs a right to sue in federal court; they were remitted to filing a

complaint for reparations before the FCC. *APCC,* 418 F.3d at 1250.

The Supreme Court, however, held in *Global Crossing* that a violation of the regulation at issue is a violation of § 201(b) of the Act, for which a private right of action is authorized by § 207 of the Act, in effect creating a right of action to remedy a violation of the regulation itself. 127 S.Ct. at 1516. It is now clear, therefore, that APCC et al. may pursue their case in district court under § 201(b). Accordingly, the orders of the district court denying the motions to dismiss are affirmed, and the case is remanded for further proceedings.

So ordered.

418 F.3d 1238

United States Court of Appeals,
District of Columbia Circuit.

APCC SERVICES, INC., et al., Appellees
v.
SPRINT COMMUNICATIONS CO., Appellant.
Nos. 04-7034, 04-7035.

Argued Oct. 21, 2004.
Decided June 28, 2005.
Rehearing Denied Nov. 10, 2005.

Appeals from the United States District Court for the District of Columbia (No. 01cv00642) (No. 99cv00696).

David P. Murray and Edward P. Lazarus argued the cause for appellants. With them on the briefs were Randy J. Branitsky and Jeffrey P. Kehne. Clifford J. Zatz entered an appearance.

Roy T. Englert, Jr. argued the cause for appellees. With him on the brief were Donald J. Russell and Michael W. Ward. Alyssa M. Campbell, Charles B. Montgomery, Jeffrey J. Ward, Sean M. Hanifin, Adam Proujansky, Albert H. Kramer, Leon B. Kellner and Leslie R. Cohen entered appearances.

Joel Marcus, Counsel, Federal Communications Commission, argued the cause as amicus curiae in support of appellees. On the brief were John A. Rogovin, General Counsel, Austin C. Schlick, Deputy General Counsel, John E. Ingle, Deputy Associate General Counsel, and Laurence N. Bourne, Counsel.

Before: *GINSBURG*, Chief Judge, and *SENTELLE* and *RANDOLPH*, Circuit Judges.

Opinion for the Court filed PER CURIAM.*

Opinion dissenting in part filed by Circuit Judge SENTELLE.

Dissenting opinion filed by Chief Judge GINSBURG. PER CURIAM.

In these consolidated appeals, we consider whether chapter 5 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-615b, creates a private right of action for an owner or operator of a payphone (hereinafter a payphone service provider, or a PSP) to recover from an interexchange carrier (IXC) the compensation for coinless payphone calls required by a regulation of the Federal Communications Commission. Before answering that question, however, we must first decide whether the plaintiffs, as the assignees of PSPs' claims against the IXCs, have standing to sue them. We conclude the plaintiffs do have standing but the Act does not provide them a right to sue in federal court.

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* *Chief Judge* GINSBURG wrote Sections I, II.A, II.B.1, and II.B.3, and *Circuit Judge* RANDOLPH wrote Section II.B.2 of the opinion for the court. *Circuit Judge* SENTELLE dissents from Section II.A with respect to the standing of the plaintiff aggregators but concurs in the judgment. *Chief Judge* GINSBURG dissents from Section II.B.2 and from the judgment.

I. Background

In 1990 the Congress enacted the Telephone Operator Consumer Services Improvement Act, Pub.L. No. 101-435, 104 Stat. 986 (codified at 47 U.S.C. § 226), which requires PSPs to allow consumers to use an access code (e.g., "10-10-220") or a subscriber 800 number to make a call from a payphone. *See* 47 U.S.C. § 226(c)(1)(B). Before then, many PSPs had blocked the use of access codes and 800 numbers because they enabled customers to "dial around" the PSP's preselected IXC, with the result that neither the IXC nor the PSP received any payment for the call.

In its initial implementation of the Act, the Commission required IXCs to compensate PSPs only for access code calls, not for calls to subscriber 800 numbers, *see Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation,* 6 F.C.C.R. 4736 ¶¶ 34, 36, 1991 WL 638196 (1991), *clarified on recons.,* 7 F.C.C.R. 4355 ¶ 50, 1992 WL 690067 (1992), but we held that compensation scheme was not fully consistent with the 1934 Act, 47 U.S.C. § 226(e)(2), and had to be reconsidered. *Fla. Pub. Telecomms. Ass'n, Inc. v. FCC,* 54 F.3d 857, 859 (D.C.Cir.1995). Then, in the Telecommunications Act of 1996, the Congress instructed the Commission to devise a new plan that would "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A). After several failed attempts, *see Ill. Pub. Telecomms. Ass'n*

v. FCC, 117 F.3d 555, 558 (D.C.Cir.1997) and *MCI Telecomms. Corp. v. FCC,* 143 F.3d 606, 607 (D.C.Cir.1998), the Commission finally crafted such a plan. *See Am. Pub. Communications Council v. FCC,* 215 F.3d 51, 52 (D.C.Cir.2000) (upholding the plan). Getting the Commission to enact a regulation requiring IXCs to compensate them for dial-around calls was only half the battle for the PSPs, however; their challenge now is to collect.

Most PSPs rely upon "aggregators" to act as intermediaries between themselves and the several IXCs; an aggregator acting on behalf of a PSP submits billing information to the IXCs and pays over to the PSP the monies it receives from the IXCs. The aggregator charges the PSP a fee based upon the number of telephone lines that PSP operates. Plaintiff American Public Communications Council Services (APCCS) is the largest aggregator, representing more than 1400 PSPs, which in turn own and operate more than 400,000 payphones nationwide.

APCCS and several other plaintiff aggregators represent that certain IXCs "have failed to pay the required [dial-around] compensation for millions of calls placed over several years." They sought authorization from their client PSPs to sue IXCs on the PSPs' behalf, and agreed to pass back to the PSPs any amounts they recovered thereby. Each PSP then signed an "Assignment and Power of Attorney" providing, in relevant part, that the PSP

> assigns, transfers, and sets over to [the aggregator] for purposes of collection all rights, title and interest of the [PSP] in the [PSP's] claims, demands or causes of action for "Dial-Around Compensation" ("DAC") due the [PSP] for periods since October 1, 1997, pursuant to Federal Communications Commission rules, regulations and orders.

The aggregators, purporting to act "as assignee[s] of the claims of and attorney[s]-in-fact" for the PSPs, then jointly filed lawsuits against Sprint, AT & T, and other IXCs, claiming each IXC had violated the Commission's dial-around compensation regulation. One PSP, Peoples Telephone Company, also participated in the lawsuits as a co-plaintiff.

AT & T moved to dismiss the cases on the ground the aggregators lacked standing to sue. The district court initially agreed and dismissed all the claims of the aggregators, *APCCS v. AT & T Corp.*, 254 F.Supp.2d 135, 137 (D.D.C.2003), but upon the aggregators' motion for reconsideration, vacated its earlier ruling and denied AT & T's motion. 281 F.Supp.2d 41, 45 (D.D.C.2003).

Another IXC, Cable & Wireless, moved to dismiss the single complaint against it on the grounds that the aggregators lacked not only standing but also a right of action for dial-around compensation under § 276 of the Act and the implementing regulation promulgated by the Commission. The district court denied that motion and permitted the plaintiffs to amend their complaints to assert that §§ 201(b), 407,

and 416(c) of Title 47 provide alternative grounds for relief. *APCCS v. Cable & Wireless, Inc.*, 281 F.Supp.2d 52, 57 (D.D.C.2003). (Cable & Wireless thereafter filed for bankruptcy and the case against it was stayed.) At the instance of Sprint and AT & T, the district court then certified its orders for interlocutory appeal, *APCCS v. Sprint Communications Co.*, 297 F.Supp.2d 90, 101 (D.D.C.2003); *APCCS v. AT & T Corp.*, 297 F.Supp.2d 101, 110 (D.D.C.2003), and we consolidated their appeals.

II. Analysis

Our review is *de novo.* We assume the factual allegations in the complaints are true. *See Greene v. Dalton,* 164 F.3d 671, 674 (D.C.Cir.1999). Because Article III standing is a jurisdictional requirement, we begin our analysis there. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

A. The Aggregators' Standing

Sprint and AT & T argue the aggregators lack standing to sue because they do not have "a concrete personal stake in the litigation." As these IXCs see things, the aggregators' "skeletal and conditional" assignments from the PSPs are insufficient to confer standing because they transfer only "bare legal title" to the claims of the PSPs, that is, the right to sue "for purposes of collection" but not the right to the recovery. Here the IXCs point out that the aggregators

have promised to return to the PSPs all the proceeds from the litigation.** Further, they contend the assignments, notwithstanding their terms, are in fact "completely revocable" by the PSPs.

In terms of the "irreducible constitutional minimum" requirements for standing-injury-in-fact, causation, and redressability, *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) – the IXCs first argue the aggregators have not suffered any injury of their own, and the assignments do not confer upon the aggregators the right to assert the injury of the PSPs. The IXCs also argue the relief the aggregators seek would not redress their purported injury because the aggregators would not keep any portion of such damages as may be awarded.

There are some circumstances in which a plaintiff has standing to sue based upon an injury to someone else. Indeed, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 773, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), the Supreme Court stated in no uncertain terms that "the

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** Even if the IXCs are correct that the aggregators do not have standing as assignees, we note that Peoples Telephone Company, a PSP, and two aggregators, Jaroth, Inc. and NSC Telemanagement, would still have standing. Jaroth contends it owned a 17% interest in a PSP at the time the lawsuit was filed, and NSC contends it will receive 10% of any compensation it collects on behalf of an affiliated PSP. Part II.A, therefore, deals with the standing only of those aggregators whose interest in the lawsuit stems solely from an assignment.

assignee of a claim has standing to assert the injury in fact suffered by the assignor." At the same time, however, the Court said that the assignee must have a "concrete private interest in the outcome of the suit" that is related to the injury asserted. *Id.* at 772, 120 S.Ct. 1858.

Therefore, in order to determine whether the aggregators have standing, we must first determine the effect of the assignments, which purport to transfer to them "all rights, title and interest" in the PSPs' dial-around compensation claims. We must then determine whether the aggregators have a stake in the outcome of the suit, notwithstanding their contractual obligation to account to the PSPs for any award of damages.

1. The assignments

Sprint and AT & T offer two reasons to believe the assignments did not transfer the PSPs' compensation claims to the aggregators so as to give the aggregators standing to sue. First, the transferred ownership interest was only "for purposes of collection." Second, the assignments were "completely revocable" by the PSPs.

We need not dwell upon the IXCs' first argument The quoted phrase appears in the following context: "[The PSP] hereby assigns, transfers and sets over to [the aggregator] for purposes of collection all rights, title and interest of [the PSP] in [the PSP's] claims, demands or causes of action" for dial-around compensation. The

phrase "for purposes of collection," which the IXCs portray as a fatal limitation, we think a mere reflection of the aggregator's promise to pass back to the PSP whatever it is able to collect. Whether that obligation affects the aggregator's standing is a distinct question, which we consider in Part II.A.2 below, but it certainly does not affect the validity of the assignment of the PSP's dial-around compensation claim. The IXCs, therefore, give us no reason to believe the assignment is anything less than a complete transfer to the aggregator of the PSP's dial-around compensation claim.

Equally unavailing is the IXCs' contention that the assignments are "completely revocable." By their terms, the assignments "may not be revoked without the written consent of [the aggregator]." Sprint and AT & T suggest the court should treat this provision as a mere "formality," because APCCS sent to each of its client PSPs a letter stating: "If at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose." The possibility that APCCS would no longer represent a PSP in litigation does nothing, however, to suggest the PSP could revoke the assignment as long as APCCS continues to represent the PSP in the litigation. Of course, APCCS itself could repudiate the assignment and presumably would do so if it no longer wanted to represent the PSP in the litigation. In any event, the assignment itself is plain: the PSP may not revoke it without the consent of the aggregator.

Having rejected both the IXCs' arguments challenging the effect of the assignments, we turn to the question whether the aggregators' promise to pass along the proceeds of litigation affects their standing to sue.

2. Pass back of the proceeds

Sprint and AT & T also argue the aggregators lack standing because the assignments effectively give them only the right to sue; the aggregators will reap no direct financial benefit from the suit. In that respect, Sprint and AT & T argue, the interest of the aggregators in this case is unlike that of a *qui tam* relator, whose standing the Supreme Court upheld in *Vermont Agency,* 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836. Here, the IXCs argue, the aggregators retain "no genuine economic interest" in the dial-around compensation claims as a result of their promises to pay the proceeds to the PSPs, whereas a *qui tam* relator benefits from the bounty he receives if his claim is successful. *Id.* at 772, 120 S.Ct. 1858.

According to the IXCs, this case is better compared to *Connecticut v. Physicians Health Services of Connecticut, Inc.,* 287 F.3d 110 (2002), in which the Second Circuit held that the State of Connecticut lacked standing to assert claims against an insurance company offering managed care plans to Connecticut residents. The State claimed standing on the ground that several plan participants had assigned to the State their right to seek "appropriate equitable relief

with respect to any cause of action they may have as plan participants or beneficiaries." *Id.* at 112. The Second Circuit concluded that Connecticut did not have a "concrete private interest in the outcome of the suit" because "[n]one of the remedies being sought would flow to the State as assignee." *Id.* at 118. The assignments at issue did not "confer 'actual' rights or benefits . . . on the State. The right to recover benefits or to seek money damages remain[ed] with the assignor." *Id.* at 115. Therefore, the court held that, "[e]ven if the assignments are valid as a contractual matter, they . . . merely give the State the right to act as a nominal party." *Id.* at 118.

The assignments at issue here, in contrast, transfer to the assignees the entire interest of the PSPs in their dial-around compensation claims, and, as explained in Part II.A.1 above, there is nothing to suggest the assignments were invalid. As for the question that remains – whether the aggregators' promise to hand over any recovery to the PSPs means the aggregators have no stake in the case – *Physicians Health* is not helpful; it did not address the question whether an assignee that would otherwise have standing to sue loses its standing when it obligates itself to give the proceeds of the suit to another.

Still, we are not entirely without guidance. As the district court observed, the identical issue has arisen under Federal Rule of Civil Procedure 17(a): "Every action shall be prosecuted in the name of the real party in interest." Courts and commentators agree that, if an assignment properly transfers ownership of a claim,

then the assignee's interest "is not affected by the parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought on the claim." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir.1997); *see also Titus v. Wallick*, 306 U.S. 282, 289, 59 S.Ct. 557, 83 L.Ed. 653 (1939) (legal effect of assignment "was not curtailed by the recital that the assignment was for purposes of suit and that its proceeds were to be turned over or accounted for to another"); James Wm. Moore, Et Al., Moore's Federal Practice § 17.11[1][c] (3d ed. 1997) ("The assignee is real party in interest even though assignee must account to the assignor"); 6A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 1545 at 348 (1990) ("[F]ederal courts have held that an assignee for purposes of collection who holds legal title to the debt . . . is a real party in interest even though the assignee must account to the assignor for whatever is recovered in the action").

Sprint and AT & T counter with the observation that Rule 17(a) and the requirement of standing "are governed by different standards and serve distinct purposes." That is true enough, as far as it goes: Standing depends in part upon elements "clearly unrelated to the rather simple proposition set out in Rule 17(a)," Fed. Prac. & Proc. § 1542 at 330. But standing also depends in part, as does a plaintiff's status as the real party in interest, upon having "a personal interest in the controversy," *Whelan v. Abell*, 953 F.2d 663, 672 (D.C.Cir.1992), and that is the only

requirement at issue in the IXCs' challenge to the aggregators' standing in this case.

We see no basis for distinguishing the personal stake required under Rule 17(a) from the interest required for standing. What the aggregators have promised to do with any recovery is irrelevant to their standing – as it would be to their status as real parties in interest. We need only be satisfied that the aggregators received a valid assignment of the claims, so that any damage award will be payable to them in the first instance. Upon that score the IXCs have cast no doubt.***

B. Private Right of Action

Sprint and AT & T contend that nothing in chapter 5 of the Communications Act authorizes a PSP to sue an IXC for failure to pay the dial-around compensation required by the regulation the Commission promulgated to implement § 276. In determining whether the Act creates a private right of action, the court's task is straightforward: We must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy," for "private

*** Because we conclude the aggregators have standing as assignees, we need not consider their alternative claim, which is that they have associational standing. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C.Cir.2002).

rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval,* 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

1. Section 276

Section 276(b)(1) provides in relevant part:

> In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public . . . the Commission shall . . . prescribe regulations that –
>
> (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.

As the plaintiffs acknowledge, § 276 itself does not create a private right of action; nor does it hold a common carrier liable for failing to comply with the requirements of the Act. According to the plaintiffs, however, those gaps are filed by §§ 206 and 207, respectively.

Section 206 provides in relevant part:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in [chapter 5] prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in [chapter 5] required to be done, such common carrier shall be liable to

> the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of [chapter 5].

And § 207 provides in relevant part: Any person claiming to be damaged by any common carrier subject to the provisions of [chapter 5] . . . may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of [chapter 5], in any district court of the United States of competent jurisdiction.

The question, then, is this: According to the allegations of the complaint, did Sprint and AT & T, which are common carriers, do something made unlawful by, or fail to do something required by, § 276? If so, then § 206 makes them liable to any person injured as a result, and § 207 permits "any person claiming to be damaged" to sue them in federal court.

The district court reasoned that § 276(b)(1)(A)"confers upon PSPs a right to be 'fairly compensated,'" while the Commission's regulation "provides the details necessary to implement" that statutory right – namely, who must compensate the PSPs, and by how much. 281 F.Supp.2d at 56. According to the district court, the regulation "implements the Congressional mandate . . . by specifying what it means to be 'fairly compensated'; as such, when a common carrier violates the regulation, it is effectively doing something 'declared to be unlawful'

within the meaning of section 206 and is therefore subject to suit under section 207." *Id.*

In *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (2003), another case brought by aggregators against IXCs on behalf of PSPs, the Ninth Circuit read the same statute quite differently. That court first observed that § 276 "does not establish a *right* to compensation, or to compensation by *IXCs*. The statute does not say 'PSPs shall be entitled to fair compensation,' or 'IXCs shall pay PSPs.'" Viewing the "lack of rights – creating language in § 276 [as] crucial," the court held that, when an IXC fails to pay a PSP the compensation prescribed by the Commission, "there is no violation of the Act to be remedied through the private right of action afforded by §§ 206 and 207." *Id.* at 1050-52.

We join the Ninth Circuit in holding that § 276 does not create a right of action for a PSP (or its assignee) to recover dial-around compensation from an IXC. As our sister circuit observed, the Supreme Court in *Sandoval* held that § 602 of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d-1, did not reflect an intent on the part of the Congress to create a private right of action specifically because there was no "rights-creating language" in the statute. 532 U.S. at 288, 121 S.Ct. 1511. The same is true of § 276 of the Communications Act. That section is by its terms addressed neither to the rights of PSPs nor to the obligations of IXCs. Rather, it is "yet a step further removed: It focuses . . . on the agenc[y] that will do the regulating." *Id.* Section 276 is addressed only to

"the Commission," which it directs to "take all actions necessary . . . to ensure that all [PSPs] are fairly compensated" for the calls they originate.

Nothing in the statute requires the Commission to designate the IXC as the party responsible for dial-around payment. Indeed, as the IXCs note, the Commission identified the caller and the recipient as possible payors, and in fact it considered a "caller pays" scheme before eventually concluding that a "carrier pays" scheme was more practical. *See* Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 11 F.C.C.R. 6716 ¶ 24, 1996 WL 436930 (1996); *see also Greene* 340 F.3d at 1051 n. 3 (discussing alternative schemes the Commission considered).

Because the IXCs are not regulated by § 276, there is no way in which they could have violated that provision. They may have violated a regulation implementing § 276, but § 206 makes a common carrier liable only for violating chapter 5 itself – not for a violating a regulation issued by the Commission pursuant to chapter 5. Because it is not a violation of § 276 for an IXC to fail to pay dial-around compensation to a PSP, the plaintiffs do not have a right of action, based upon that section, against the IXCs.

2. Section 201(b)

Plaintiffs contend that even if they cannot rely on § 276, a common carrier's failure to comply with the

Commission's regulations violates § 201(b) of the Act, which in turn triggers the provisions (§§ 206 and 207) allowing suit in federal court. Section 201(b) provides that any "charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." A common carrier's failure to compensate PSPs for dial-around calls, plaintiffs argue, is a "practice" that is "unjust or unreasonable," and therefore "unlawful" under the Act.

At the heart of plaintiffs' argument is the notion that it is inherently an unreasonable practice, within the meaning of § 201(b), to violate a Commission regulation. That reading would transform § 201(b) into a catchall provision, converting any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court. This result is not plainly evident from the text of the Act, and nothing suggests that Congress intended its words to have such a sweeping effect.

It is important to keep in mind that the question here is not so much whether there is a private right of action, but where – directly in district court, or in the Commission. This is different from *Sandoval,* in which the alternative to a right of action in court was no action anywhere. Still *Sandoval* has something to say about the issue facing us, if only in dicta: "[W]hen a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable." 532 U.S. at 291, 121 S.Ct. 1511.

Here, the body of the FCC's 1999 "Order" said not a word about § 201(b). All we see is boilerplate in the ordering clause, and in the clause identifying the authority for Part 64 of the rules, citing a list of sections including "201." (This is in marked contrast to the treatment of § 276, which the Commission mentioned throughout as the source of its authority.) It cannot be that the mere citation of § 201 displays – in *Sandoval*'s words – an intent that the regulation setting the compensation level should be privately enforceable in court. Still less can it be that the mere citation of § 201 is entitled to *Chevron* deference as the agency's authoritative interpretation of § 201(b). The dissent's quotation of the following statement from *Sandoval* is therefore inapposite: a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284, 121 S.Ct. 1511. There was no authoritative interpretation of § 201(b) in this case. For all we know, the Commission in 1999 never even thought about suits directly in district court. Certainly the body of the Order itself gave no clue that it did so. In fact, in some of the paragraphs talking about the PSPs compensating the carriers for overpayments, the assumption appears to be that collection actions will be before the Commission (as indeed they must be in an any action by a carrier against a PSP for not making a refund). *See, e.g., In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications*

Act of 1996, 14 F.C.C.R. 2545 ¶¶ 195-99, 1999 WL 49817 (1999).

A court should be reluctant to put words in the Commission's mouth – here, the words "unjust and unreasonable." The Commission never, in its 1999 Order, specified that a carrier's failure to pay was of this magnitude. Given the potential consequences to judicial dockets of the Commission's making that finding, we should require a clear statement (and analysis) by the agency. What the Commission meant by citing § 201 at the end of its Order is anyone's guess. If the Order itself indicated that the Commission expected payphone providers to be able to collect in judicial actions that would be another matter. But nothing in the Order so indicates and as stated above, there is at least a suggestion that the Commission expected collection actions to be administrative. *See, e.g., Ascom Communications, Inc. v. Sprint Communications, Inc.,* 15 F.C.C.R. 3223, 3237, 2000 WL 135252 (2000) (adjudicating a claim against Sprint for a violation of § 201(b)).

The dissent also invokes our decision in *MCI Telecommunications Corp. v. FCC,* 59 F.3d 1407 (D.C.Cir.1995), but the holding of that case is too narrow to be of any help in this case. *MCI,* as well as the line of precedent on which it relied, did not involve Commission prescriptions in general, but rather referred specifically to ratemaking under § 205. *Id.* at 1414. The Commission's ratemaking power is expressly defined as the authority "to determine and prescribe what will be the *just and reasonable*

charge." 47 U.S.C. § 205(a) (emphasis added). It is one thing to hold that when Congress instructs the Commission to set a "just and reasonable" rate for common carriers, their noncompliance with the rate will be considered "unjust and unreasonable"; it is quite another to extend that reasoning to encompass all Commission regulations governing common carriers. In addition, *MCI* involved claims brought before the Commission – not in a federal district court. When *MCI* is viewed in the new light of *Sandoval,* its value as a precedent in this case is diminished still further.

We do not say that the Commission has no power to interpret § 201(b) to encompass violations of its rules, and thereby to create private rights of action in courts when previously there were none. We do say the Commission did not attempt to exercise any such power here. Plaintiffs therefore cannot proceed under § 201(b).

3. Sections 407 and 416(c)

The plaintiffs next look to 47 U.S.C. §§ 407 and 416(c) to supply the right to sue the IXCs in federal court. Section 407 authorizes a "complainant" to petition the district court for damages based upon a carrier's failure "to comply with an order for the payment of money within the time limit in such order." The plaintiffs contend the regulation providing for dial-around compensation is such an "order."

In the alternative, the plaintiffs contend § 416(c), read in conjunction with §§ 206 and 207, gives them a right of action. That provision states, "It shall be the duty of every person . . . to observe and comply with [every order of the Commission] so long as the same shall remain in effect." According to the plaintiffs, the compensation regulation is also an "order" within the meaning of § 416(c), and §§ 206 and 207 make the failure to comply therewith actionable in federal court.

The IXCs argue in response that the regulation at issue is not an "order" within the meaning of either § 407 or § 416(c) because that term, as used in those sections, includes only Commission decisions arising out of an adjudicatory, as opposed to a rulemaking, proceeding. They argue that to interpret "order" to include rulemaking decisions makes no sense in light of § 416(a), which requires that every order be served upon the carrier's designated agent, and of § 416(b), which authorizes the Commission "to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

We agree with the IXCs that "order" in §§ 407 and 416(c) refers only to adjudicatory and not to rulemaking decisions. Although the Communications Act does not define the term "order," the Administrative Procedure Act does: "'order' means the whole or part of a final disposition . . . of an agency in a matter other than a rule making." 5 U.S.C. § 551(6). We recognize that the circuits are divided over the question whether "order" as used in § 401(b), a companion

provision to those at issue here, includes a decision promulgated through rulemaking. The Ninth Circuit has held that it does, reasoning that "[w]hen Congress intended the APA's definition of a term to be incorporated into the Communications Act, it said so." *Hawaiian Tel. Co. v. Pub. Utilities Comm'n of Hawaii,* 827 F.2d 1264, 1271 (9th Cir.1987); *see also Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n,* 913 F.2d 305, 308 (6th Cir.1990) (following *Hawaiian Tel. Co.* and citing cases from 4th, 5th, 7th, and 8th Circuits).

We are persuaded otherwise for the reasons laid out at length by then – Judge Breyer in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 742 F.2d 1, 4-9 (1st Cir.1984) (relying in part upon APA definition of "order" in concluding § 401(b) is limited to "adjudicatory orders"). We are particularly convinced that, as the First Circuit said of that provision, making §§ 407 and 416(c) applicable to Commission regulations would "interfere seriously with the well established principle that the 'enforcement' of the Communications Act is entrusted primarily to" the FCC, *id.* at 5, rather than to the district courts.

Further, the plaintiffs' reading of §§ 407 and 416(c) would render § 201(b) superfluous: any failure to comply with a regulation, not only unjust and unreasonable practices, would be a violation of the Act and therefore actionable under §§ 206 and 207. *See Alaska Dep't of Envtl. Conservation v. EPA,* 540 U.S. 461, 489 n. 13, 124 S.Ct. 983, 157 L.Ed.2d 967

("It is . . . a cardinal principle of statutory construction that a statute ought, upon the whole, be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant"). And, to those provisions of § 416 that the IXCs correctly identify as inconsistent with the plaintiffs' broad interpretation of "order," we add § 415(f), the one year statute of limitations for filing a petition to enforce a Commission order for the payment of money. If orders included regulations, then a complainant would be able to seek enforcement of a regulation only for the first year after it is promulgated. That simply cannot be.

For these reasons, and because we agree entirely with the First Circuit's analysis in *New England Telephone and Telegraph,* we reject the plaintiffs' contention they can sue the IXCs pursuant to §§ 407 and 416(c).

III. Conclusion

We hold that, as a result of the PSPs' valid assignment of their claims to the plaintiff aggregators, the aggregators have standing to sue the defendant IXCs for failing to pay the PSPs dial-around compensation as required by the regulation; that the aggregators have promised to pass back to the PSPs any recovery from the lawsuit is immaterial for the purpose of determining their standing. We also hold that none of the provisions of the Act upon which the plaintiffs rely grants them the right to sue in federal court to recover dial-around compensation the IXCs

are required by regulation to pay. The orders of the district court denying the IXCs' motion to dismiss are therefore

Reversed.

SENTELLE, Circuit Judge, concurring in part and dissenting in part.

In considering whether the plaintiff aggregators have standing to sue, I, like the Court, begin with the same basic question: "We must . . . determine whether the aggregators have a stake in the outcome of the suit[.]" Maj. Op. at 1243. Because I conclude that most of the aggregators do not have a concrete private interest in the outcome of this suit, I must respectfully dissent from Part II.A of the Court's opinion.*

The PSPs' assignment of rights to APCC is materially limited: "'[The PSP] hereby assigns, transfers, and sets over to [the aggregator] *for purposes of collection* all rights, title, and interest of [the PSP] in [the PSP's] claims, demands or causes of action' for dial-around compensation." What the Court sees as "a mere reflection" of a technical detail not affecting the substance of the relationship, I see as the first clue that the PSPs, not the aggregators, would be the only

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* As noted by the Court, Maj. Op. at 1242 n. **, this discussion only applies to those plaintiff aggregators that do not own, wholly or in part, PSPs.

plaintiffs with a real stake in the outcome of this controversy.

The Supreme Court's statements on the "irreducible constitutional minimum" of standing, under Article III, are straightforward: first and foremost, the plaintiff "must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quotation marks, footnote, and internal citation omitted). Of course, as this Court recognizes, the party that actually suffered the injury in the first instance need not be the party to bring suit; under *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* an assignee of the injured party's claim may have standing to sue. 529 U.S. 765, 771-74, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000).

The doctrine of assignee standing does not wholly erase the basic requirements of standing, however. There are "assignments," and then there are assignments. Only an assignment that gives the assignee an actual interest in the recovery is sufficient for standing.

The assignee standing doctrine recognized by the Supreme Court (and cited by this Court, Maj. Op. at 1243) clearly refers to an actual assignment of an interest that secures a portion of the recovery. *See Vermont Agency,* 529 U.S. at 773, 120 S.Ct. 1858 ("The

FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim."). The cases cited in *Vermont Agency* as exemplifying "assignee standing" reflect this fact. *See Poller v. Columbia Broadcasting System, Inc.*, 284 F.2d 599, 602 (D.C.Cir.1960), *rev'd*, 368 U.S. 464, 465, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) (plaintiff in antitrust suit was assignee of all of the assets of the dissolved corporation (of which he was previously the sole shareholder)); *Hazeltine Research, Inc. v. Automatic Radio Mfg. Co.*, 77 F.Supp. 493, 495 (D.Mass.1948) (plaintiff in patent license suit was assignee of parent corporation's right to grant licenses under certain patents), *aff'd*, 176 F.2d 799 (1st Cir.1949), *aff'd*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950); *Manhattan Trust Co. v. Sioux City & N.R. Co.*, 65 F. 559, 568 (N.D.Iowa 1895) (intervenor assignee in suit at equity was entitled to redeem securities pledged by assignor to third party, upon assignee's payment of the loan proceeds to that third party), *aff'd sub nom. Hubbard v. Tod*, 76 F. 905 (8th Cir.1896), *aff'd*, 171 U.S. 474, 19 S.Ct. 14, 43 L.Ed. 246 (1898); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 531, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995) (plaintiff in contract dispute was subrogated *pro tanto* because, as injured party's insurer, it had paid injured party compensation that it would recover in contract parties' arbitration); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 288, 113 S.Ct. 2085, 124 L.Ed.2d 194 (1993) (plaintiff in stock fraud suit was subrogated because, as injured party's insurer, it had paid injured party compensation that it would recover

in civil suit). *See also Titus v. Wallick,* 306 U.S. 282, 286, 59 S.Ct. 557, 83 L.Ed. 653 (1939), *quoted in* Maj. Op. at 1244 (plaintiff assignee did have to account for the proceeds of the recovery and turn over the proceeds to the assignor, but assignor was obligated, under the terms of the assignment, "after paying the expenses of collection, to pay over one-half of the net recovery to [assignee's] wife, to discharge certain indebtedness of [assignee], and to pay the balance to [assignee].").

The cases cited in *Vermont Agency* as exemplifying the accepted doctrine of "assignee standing" share a common characteristic noticeably absent from the case before us: in each of those cases the "assignment" gave the putative plaintiff a direct share in the recovery. This necessary characteristic renders those cases consistent with *Vermont Agency's* requirement that the putative plaintiff have "a concrete private interest in the outcome of the suit" in order to attain standing. 529 U.S. at 772, 120 S.Ct. 1858 (quoting *Lujan,* 504 U.S. at 573, 112 S.Ct. 2130) (quotation marks & brackets omitted).

Under *Vermont Agency* (consistent with its foundation, *Lujan*), an assignee plaintiff must both (1) seek to vindicate the injury to the assignor, and (2) hold an interest "consist[ing] of obtaining compensation for, or preventing, the violation of a legally protected right." *Vermont Agency,* 529 U.S. at 772-73, 120 S.Ct. 1858. An assignment suffices for such an interest when the assignee actually receives the benefit of the compensation he receives. Where the

"assignment" relationship is in substance a mere "agency" relationship such that the "assignee" enjoys no right to keep a part of the recovery, the irreducible constitutional minimum of standing is left unsatisfied.

In this case, the putative plaintiffs themselves recognize that the PSPs' assignment of rights to aggregators such as APCC gives them no share in the recovery. "The aggregators' compensation for billing and collection services is based on the number of payphones and telephone lines operated by their PSP clients." Br. for Plaintiffs-Appellees at 5-6. The aggregators are a pass-through entity: "Aggregators are intermediaries between PSPs and IXCs for billing and collection. An aggregator . . . collects the IXCs' payments, and distributes those payments to its PSP clients." *Id.* at 5.

The contract cited by the Court reflects the pass-through nature of the "assignee-assignor" relationship. True, according to one part of the Agreement, the PSPs "assign[ ] . . . for purposes of collection" the interest in Company's claims. But we do not interpret the contract's individual phrases apart from the rest of the contract; rather, we interpret the agreement "as a whole," along with "all writings that are part of the same transaction." *See* Restatement (Second) of Contracts § 202(2) (1979). Doubts raised by the "for purposes of collection" language of that portion of the contract are confirmed by the Amendment to APCC Services Agency Compensation Agreement, which notes that, far from taking on the rights and responsibilities

of the PSPs *en toto,* APCC merely acts as the "PSP's exclusive *agent for billing and collection.*" Amendment at 1 (emphasis added). APCC does nothing more than "tak[e] collective action *on behalf of PSP* and other[s] . . . with similar claims." *Id.* (emphasis added). APCC's obligations to each PSP in this additional agreement stretch far beyond mere "obligat[ion] to account for the proceeds of a suit brought on the claim." Maj. Op. at 1244.

As noted above, APCC has no actual financial interest in the recovery. The Amendment confirms this. APCC's compensation is determined by a schedule of variable fees determined by *current* PSP call volume, not the historical PSP call volume at issue in the case before us. APCC Services Agency Compensation Agreement, Schedule A. *See also* Sandusky Memo ("To fund the suits, all plaintiffs are being required to agree to a quarterly assessment of their dial around compensation on a per call basis."). True, if APCC's collection efforts require APCC to provide "additional services . . . over and above the services provided pursuant to the Agreement," APCC could deduct costs (again, based on current call volume) from the PSPs' recoveries, Amendment to APCC Services Agency Compensation Agreement at 2. But APCC has not alleged that such deductions are required in the present case, and we therefore have no occasion to determine whether such hypothetical deductions would be sufficient for standing.

The aggregators whose standing I find lacking advance an alternative theory that they have "associational standing." Associational standing requires three elements: first, the association's members must otherwise have standing to sue in their own right; second, the interest the association seeks to protect must be germane to its purpose; third, neither the claim asserted nor the relief requested must require the individual members to participate in the suit. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). The aggregators assert that they meet each requirement and therefore have associational standing. I disagree.

An aggregator cannot have "associational standing," because an aggregator is not an "association." The assignors of rights to the aggregators do not thereby become members of the aggregators. Indeed, the aggregators have no members at all. "In determining whether an organization that has no members in the traditional sense may nonetheless assert associational standing, the question is whether the organization is the functional equivalent of a traditional membership organization." *Fund Democracy, LLC v. SEC,* 278 F.3d 21, 25 (D.C.Cir.2002). The aggregators are no such thing. APCC Services, Inc., Davel Communications Group, Inc., Data Net Systems, L.L.C., Intera Communications Corp., Jaroth, Inc., and NSC Telemanagement Corp. are all for-profit companies with contractual relationships with a number of other companies. One corporation does not become a member of another corporation by

reason of entering into contracts with it. The aggregators are in no sense "membership organizations." They are not even "organizations." They are incorporated entities – legal persons – and their clients are no more their "members" than a law firm's clients are the firm's "members."

In sum, I would respond to the District Court's certified question for interlocutory appeal with instructions to dismiss the complaint with respect to the aggregators that do not own PSPs either in whole or in part. I therefore dissent, respectfully, from Part II.A of the opinion of the Court.

GINSBURG, Chief Judge, dissenting with respect to Section II.B.2 and to the judgment.

Because I believe the plaintiffs have a right to pursue their claims for dial-around compensation under 47 U.S.C. § 201(b), I would affirm the order of the district court on that ground.

Section 201(b) provides in relevant part:

> All charges, practices, classifications, and regulations for and in connection with [a] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Sections 206 and 207 afford a private right of action based upon conduct made unlawful by chapter 5 of the Act. Section 201(b), which is in chapter 5, makes unlawful any "unjust or unreasonable" practice in connection with a communication service. It is undisputed that both IXCs and PSPs provide a "communication service," and that the Commission is charged with prescribing rules and regulations interpreting what is just and reasonable. *See* 47 U.S.C. § 201(b); *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378-79, 397, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). I agree with the plaintiffs that the IXCs' failure to pay dial-around compensation constitutes an "unjust and unreasonable practice" as the agency has interpreted that phrase.

In rejecting the plaintiffs' argument on that score, the court frames the question not as whether there is a private right of action under § 201(b), in conjunction with §§ 206 and 207, but where such an action is to be heard – in district court or before the Commission. According to the court, there is no indication "the Commission in 1999 . . . even thought about suits directly in district court" to recover for a violation of the regulation, op. at 1247, and had the Commission made its intention known, "that would be another matter." *Id.* at 1247-1248. I disagree. It is not for the Commission to decide whether the plaintiffs may sue in federal court for a violation of the statute; the Congress has already made that determination. Section 207 provides that "any person claiming to be damaged by a common carrier['s]"

violation of Chapter 5 "may either make complaint to the Commission . . . or may bring suit . . . in any district court of the United States of competent jurisdiction."

The PSPs allege the IXCs have violated § 201(b) by failing to pay the sums required by the dial-around compensation regulation. In promulgating that regulation the Commission invoked, in addition to § 276(b)(1)(A), its authority under §§ 201-205, *see In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 14 F.C.C.R. 2545 ¶ 232, 1999 WL 49817 (1999). In its 2003 Report and Order on the regulation, the agency made express what had previously been implied, namely, that "failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *Pay Telephone Reclassification and Compensation Provisions,* Report & Order, 18 F.C.C.R. 19975 ¶ 32, 2003 WL 22283556 (2003). That is clearly an authoritative interpretation of § 201(b). The court can say "[t]here was no authoritative interpretation of § 201(b) in this case" only because it makes no mention of the 2003 Report and Order and fails to note that the Commission filed an amicus brief in this case advancing the same position. I disagree that the Commission has not exercised its interpretive authority in this case; the question, as I see it, I whether its interpretation is correct.

The IXCs and the court claim that, if § 201(b) applies here, then a common carrier's violation of any regulation of the Commission could be said to constitute an unjust and unreasonable practice. I see no need to go so far, however, in order to uphold the agency's interpretation of § 201(b) with respect to this regulation. Indeed, I would simply reiterate what this court said a decade ago, namely, that when the Commission reasonably deems the failure of a common carrier to act in a specified way to be an unjust and unreasonable practice, a carrier that fails to comply with the Commission's prescription violates the Act. *See MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1414 (1995) ("We have repeatedly held that a rate-of-return prescription has the force of law and that the Commission may therefore treat a violation of the prescription as a *per se* violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates"). Contrary to the suggestion of the IXCs, *Sandoval* does not instruct otherwise. As the Court there explained, it is "meaningless to talk about a separate cause of action to enforce" a regulation that authoritatively construes a statute. 532 U.S. at 284, 121 S.Ct. 1511. "A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.*

I find the IXCs' other arguments for rejecting the Commission's interpretation of § 201(b) equally unpersuasive. The IXCs maintain that § 201(b) does not apply here because it "relates [only] to the common

carriers' provision of communication services to their customers," but they do not even purport to ground that limitation in the text. Nor is there any precedent supporting such a limitation. On the contrary, both the Commission and this court have previously applied § 201(b) to one carrier's provision of a communication service to another carrier. *See MCI,* 59 F.3d at 1414 (§ 201(b) makes unlawful carrier's violation of agency regulation setting maximum rate-of-return for interstate access); *Ascom Communications, Inc. v. Sprint Communications Co.,* 15 F.C.C.R. 3223, 2000 WL 135252 (2000) (§ 201(b) makes unlawful carrier's attempt to collect from PSP for unauthorized and fraudulent calls placed from PSP's phones over carrier's network).

Sprint and AT & T next argue that § 201(b) applies only to the violation of a regulation, like the one at issue in *MCI,* promulgated exclusively pursuant to § 205 of the Act, which authorizes the Commission to set just and reasonable rates for services. I disagree – as does the Commission, which has invoked § 201(b) in several contexts to which § 205 does not pertain. *See, e.g., Ascom,* 15 F.C.C.R. at 3227 ("we conclude that Sprint violated section 201(b) when it charged Ascom for certain calls for which Ascom was not a customer"); *In re Telephone Number Portability,* 18 F.C.C.R. 23697 n. 76, 2003 WL 22658207 (2003) ("we note that a violation of our number portability rules would constitute an unjust and unreasonable practice under § 201(b) of the Act"); *Core Communications, Inc. v. SBC Communications Inc.,* 18 F.C.C.R.

7568 ¶ 25, 2003 WL 1884294 (2003) (failure to comply with merger conditions held an unjust an unreasonable practice). The IXCs offer no reason to believe the Commission may determine what constitutes an unjust or unreasonable practice only if, in doing so, it relies exclusively upon its authority under § 205. That limitation cannot be found in either § 201(b) or in § 205.

Having rejected each of the arguments raised by the IXCs, I see no reason to deem unreasonable the Commission's determination that it is an unjust and unreasonable practice for a common carrier to fail to pay PSPs as required by the regulation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Congress delegated to the Commission the responsibility of prescribing "such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act, 47 U.S.C. § 201(b), and then specifically directed the Commission to establish a compensation plan that "fairly compensates" PSPs for dial-around calls. 47 U.S.C. § 276(b)(1)(A). The agency in turn set a rate for dial-around compensation that it believed to be "fair to both payphone owners and the beneficiaries of those calls" and to serve the public interest by ensuring "the widespread deployment of payphones." 14 F.C.C.R. 2545 ¶ 59. This court upheld the Commission's reasoning, so the justness and reasonableness of the rates is no longer open to challenge. *See APCC v. FCC*, 215 F.3d at 52. One would therefore be hard-pressed to say the

Commission acted unreasonably when it deemed a common carrier's failure to pay just and reasonable compensation an unjust and unreasonable practice. *See Capital Network Sys., Inc. v. FCC,* 28 F.3d 201, 204 (D.C.Cir.1994) ("Congress entrusted the administration of the Communications Act to the FCC. . . . Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them").

Accordingly, I would hold the plaintiffs may sue the defendant IXCs under § 201(b) for failure to comply with the Commission's regulation governing dial-around compensation, and would affirm the district court's order on that basis.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-8001, 04-8002.

AT&T Corp.,

Petitioner,

v.

APCC SERVICES, INC., et al.

Respondents.

SPRING COMMUNICATIONS CO., L.P.,

Petitioner,

v.

APCC SERVICE, INC., et al.,

Respondents.

March 1, 2004

BEFORE: ROGERS, TATEL, and ROBERTS, Circuit Judges.

ORDER

PER CURIAM.

Upon consideration of the petitions for permission to appeal pursuant to 28 U.S.C. § 1292(b), the responses thereto, and the replies, it is

ORDERED, on the court's own motion, that these cases be consolidated. It is

FURTHER ORDERED that the petitions be granted. *See* 28 U.S.C. § 1292(b). This court has jurisdiction to consider all issues presented in the district court's September 3, 2003 order, *APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C. 2003), and December 17, 2003 order in *APCC Servs., Inc. v. Sprint*, Civ. No. 01-642. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-05, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (appellate jurisdiction under § 1292(b) applies to the entire district court order, and is not tied to the particular question formulated by the district court). Approval of the petitions is without prejudice to reconsideration by the merits panel.

The Clerk is directed to transmit a certified copy of this order to the district court. The district court will file the order as a notice of appeal pursuant to Fed. R.App. P. 5 and collect the mandatory docketing fee from appellants. Upon payment of the fee, the district court is to certify and transmit the preliminary record to this court, after which the case will be

assigned a general docket number and proceed in the normal course.

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A. 010642 ESH.
v.	*	
SPRINT COMM'N CO. L.P.	*	Dec. 17, 2003
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

Plaintiffs in this case, as well as in several others before the Court, seek payment from common carriers of "dial-around compensation" on behalf of payphone service providers ("PSPs") for certain long distance phone calls originating from their payphones.[1] They claim that the carriers have violated section 276(b)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. § 276, and its implementing

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[1] Pending before this Court are four additional cases that raise nearly identical issues: *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696 (D.D.C.); *CFL v. AT & T Corp.*, Civ. No. 01-1531 (D.D.C.); *APCC Servs., Inc. v. WorldCom*, Civ. No. 01-0638 (D.D.C.) (stayed pending bankruptcy); and *APCC Servs., Inc. v. Cable and Wireless, Inc.*, Civ. No. 02-0158 (D.D.C.) (stayed pursuant to Cable & Wireless's suggestion of bankruptcy filed on December 10, 2003).

regulations, codified at 47 C.F.R. § 64.1300. Plaintiffs base their claims on sections 206 and 207 that provide for the recovery of damages for violations of the Act.

All of the cases before this Court present an initial question as to whether section 276 and its implementing regulations confer a private right of action to sue for a common carrier's alleged failure to pay adequate dial-around compensation. On September 4, 2003, the Court, upon motion to dismiss by Cable & Wireless, found that plaintiffs have a right of action and can base their claims on section 276. *APCC Servs., Inc. v. Cable & Wireless, Inc.*, 281 F.Supp.2d 52 (D.D.C. 2003) ("*C & W*"). Consistent with that ruling, the Court also allowed plaintiffs to amend their complaint to add additional grounds under sections 201(b), 416(c) and 407 of the Communications Act.[2] *Id.* at 57-59. Sprint has requested that the Court reconsider its rulings and dismiss the amended complaint, or alternatively, certify the question for interlocutory appeal, basing its motion in large part upon the Ninth Circuit's recent holding in *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003).[3]

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[2] Applying its ruling in *C & W*, the Court also denied Sprint's motion to dismiss, and granted plaintiff's motion to amend in *APCC Services, Inc. v. Sprint Communications Co.*, Civ. No. 02-0642 (D.D.C.) (Order issued September 3, 2002).

[3] Raising many of the same argument against plaintiffs' right to sue that Sprint presents, C & W, prior to filing for

(Continued on following page)

Four of these actions also present a question as to whether plaintiffs have Article III standing as assignees of the claims of numerous PSPs.[4] The Court initially dismissed one of these cases on March 28, 2003, finding that plaintiffs lacked standing (*see APCC Servs., Inc. v. AT & T Corp.*, 254 F.Supp.2d 135 (D.D.C. 2003) ("*AT & T I*")), but upon reconsideration, it concluded that the assignments executed by the PSPs bestowed upon the aggregator-plaintiffs standing sufficient to survive an Article III challenge. *See APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C. 2003) ("*AT & T II*"). AT & T has moved for reconsideration of the Court's second decision on the standing issue, or in the alternative, for certification of an interlocutory appeal.[5]

Whether the Act confers a private right of action to collect dial-around compensation from carriers is a controlling question of law, for it is dispositive as to

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bankruptcy, also filed a motion for reconsideration, or in the alternative, for certification of an interlocutory appeal, arguing that there is no private right of action under the Act. Curiously, AT & T, as defendant in two of the cases before the Court, has never challenged the proposition that plaintiffs may sue under the Communications Act for the alleged failure to pay dial-around compensation.

[4] This issue is not presented by *CFL v. AT & T Corp.*, Civ. No. 01-1531 (D.D.C.).

[5] Prior to filing for bankruptcy, C & W also moved for reconsideration of the Court's decision on standing, or in the alternative, for certification of an interlocutory appeal.

all cases before the Court.[6] To the extent that a private right of action is found to exist, the issue of whether the assignees have standing to sue is also controlling, and is dispositive as to three of the five pending actions.[7] An immediate appeal to the Circuit Court of these issues will prevent potentially unnecessary and protracted litigation while definitively resolving these disputed jurisdictional issues. Thus, although the Court is unwilling to reconsider its prior opinions in *C & W* and *AT & T II*, it will grant the carriers' motions for certification of an interlocutory appeal of both decisions.

Each of the cases is based upon the rights arguably conferred by § 276 and its implementing regulations. One plaintiff (Peoples Telephone Company) in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696, has brought a breach of contract claim as well, but the Court has no diversity jurisdiction over that claim, so without a private right of action under the

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[6] Each of the cases is based upon the rights arguably conferred by § 276 and its implementing regulations. One plaintiff (Peoples Telephone Company) in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696, has brought a breach of contract claim as well, but the Court has no diversity jurisdiction over that claim, so without a private right of action under the Communications Act, the Court would have no basis to exercise jurisdiction over the contract claim.

[7] There are a limited number of non-assignee plaintiffs named in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696 (D.D.C.), and *CFL v. AT & T Corp.*, Civ. No. 01-1531 (D.D.C.), that would be unaffected by a decision that the assignee-plaintiffs lack standing.

Communications Act, the Court would have no basis to exercise jurisdiction over the contract claim.

LEGAL ANALYSIS

Whether to allow an interlocutory appeal of a non-final order is left to the discretion of the district court. *Swint v. Chambers County Comm'n,* 514 U.S. 35, 47, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). The court may certify such an appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation. *See* 28 U.S.C. § 1292(b); *Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1002 n. 2 (D.C. Cir. 1986); *In re Korean Air Lines Disaster,* 935 F.Supp. 10, 16 (D.D.C. 1996). The party seeking interlocutory review has the burden of persuading the Court that the "circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *In re Vitamins Antitrust Litig.,* No. 99-197, 2000 WL 33142129, at *1 (D.D.C. 2000) (citing *First Am. Corp. v. Al-Nahyan,* 948 F.Supp. 1107, 1116 (D.D.C. 1996)).

In deciding whether to grant interlocutory appeal, the Court of Appeals in this Circuit follows the collateral order doctrine, *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1026 (D.C. Cir. 1997), which allows for appeal if it "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from

the merits of the action, and (3) would be effectively unreviewable on appeal from a final judgment." *United States v. Rostenkowski,* 59 F.3d 1291, 1296 (D.C. Cir. 1995) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)).

I. Controlling Question of Law

Under § 1292(b), a "controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group,* 233 F.Supp.2d 16, 19 (D.D.C. 2002). Controlling questions of law include issues that would terminate an action if the district court's order were reversed. *See Klinghoffer v. S.N.C. Achille Lauro,* 921 F.2d 21, 24 (2d Cir. 1990) (a question of law is controlling if it involves issues of personal or subject matter jurisdiction); *United States ex rel. Wis. v. Dean,* 729 F.2d 1100, 1103 (7th Cir. 1984) (decision finding subject matter jurisdiction involves a controlling question of law); *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 755 (3d Cir. 1974) (a question is "controlling" if error in its resolution would warrant dismissal).

The resolution of an issue need not necessarily terminate an action in order to be "controlling," *Klinghoffer,* 921 F.2d at 24, but instead may involve a procedural determination that may significantly

impact the action. *See In re The Duplan Corp.*, 591 F.2d 139, 148 n. 11 (2d Cir. 1978) (a "controlling question of law" includes procedural determination affecting the conduct of an action); *Judicial Watch*, 233 F.Supp.2d at 19 (citing *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (a question of law can be controlling if it determines the outcome "or even the future course of the litigation")); *see also* 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, § 3930 at 426 (1996) ("A steadily growing number of decisions * * * have accepted the better view that a question is controlling * * * if interlocutory reversal might save time for the district court, and time and expense for the litigants."). The impact that the appeal will have on other cases is also a factor supporting a conclusion that the question is controlling. *See Klinghoffer*, 921 F.2d at 24 (citing *Brown v. Bullock*, 294 F.2d 415, 417 (2d Cir. 1961) (leave to appeal granted in part because the "determination was likely to have precedential value for a large number of other suits")); *Genentech, Inc. v. Novo Nordisk A/S*, 907 F.Supp. 97, 99 (S.D.N.Y. 1995) (a question is "controlling" if it affects a large number of cases).

Whether the Communications Act provides a private right of action to collect dial-around compensation is a controlling and dispositive question in each of the five cases, as reversal of the Court's finding would definitively terminate these actions. *See Masri v. Wakefield*, 602 F.Supp. 404, 406 (D. Colo. 1983) (certifying question as to statutory private

right of action). Similarly, if a private right of action is found to exist, the second jurisdictional issue of whether the assignee-plaintiffs have standing is also a controlling question of law. *See Klapper v. Commonwealth Realty Trust,* 662 F.Supp. 235, 236 (D. Del. 1987).[8] Although claims by individual PSPs, which are limited in number, may survive the assignees' dismissal for lack of standing, assignee standing is a procedural determination that will significantly impact the form and conduct of these actions. Moreover, because the Court should not speak to any matter over which it lacks jurisdiction, the issue is controlling. *See In re Sealed Case,* 131 F.3d 208, 210 (D.C. Cir. 1997) ("If we are without subject-matter jurisdiction over the case ostensibly before us, then any pronouncement on any issue * * * becomes a violation of our Article III limitations.").

It is also significant that in addition to the five cases here, PSPs and aggregators have filed numerous suits throughout the country against common carriers based on a claim of a private right of action

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[8] Plaintiffs incorrectly argue that because a determination of standing presents a mixed question of law and fact, certification would not be appropriate under section 1292(b). (*See* Pls.' Opp. to AT & T's Mot. at 21.) There is no dispute regarding the contents of the assignments at issue here, and thus, there is no factual dispute that would convert the legal question of standing into a mixed question of law and fact. Rather, the problem is how the jurisprudence involving Article III standing should be applied to the undisputed facts.

under the Communications Act, as well as an assertion of standing based on assignments executed by the PSPs.[9] Despite the rash of these cases countrywide, the parties in the cases in this jurisdiction are the major players in almost all the litigation countrywide, and the assignee-plaintiffs represent more than 400,000 of the 500,000 to 600,000 payphone lines in the United States. Moreover, the FCC, a frequent party before the D.C. Circuit, has dealt with cases similar to these[10] and has litigated issues

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[9] The Court discussed many of these cases in its Memorandum Opinion issued in *APCC Servs., Inc. v. WorldCom, Inc.*, Civ. No. 01-638, 2001 U.S. Dist. LEXIS 23988, *18-22, 2001 WL 34383565 (D.D.C. Dec. 21, 2001). For instance, suits have been filed in federal courts in Utah (*Flying J, Inc. v. Sprint Communications Co.*, Civ. No. 99-111-ST (D.Utah)), Virginia (*APCC v. VoCall Communications, Corp.* (E.D.Va.)), Pennsylvania (*see Phone-Tel Communications, Inc. v. AT & T Corp.*, 100 F. Supp 2d 313, 322 (E.D. Pa. 2000)), Arizona (*GCB Communications, Inc. v. WorldCom, Inc.*, Civ. No. 00-1216 (D.Ariz.)), Texas (*see Phonetel Techs., Inc. v. Network Enhanced Telecomm.*, 197 F.Supp.2d 720 (E.D. Tex. 2002)), California (*see, e.g., In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig.*, No. 02-ML-1483 (C.D. Cal.) (TJH) and cases collected in *C & W*, 281 F.Supp.2d at 54). Although some of these actions have been settled or dismissed, definitive resolution of the issues before the Court could have an impact on those cases that are still pending.

[10] *See, e.g., Bell Atlantic-Delaware, Inc. v. MCI Telecomms. Corp.*, 17 F.C.C.R. 15, 918, 15, 919 (¶ 3) (2002); *Flying J. Inc. and TON Services, Inc.*, Petition for Expedited Declaratory Ruling Regarding a Primary Jurisdiction Referral from the United States District Court for the District of Utah, Northern Division, Memorandum Opinion and Order, CCB/CPD No. 00-04, FCC 03-108 (May 9, 2003); *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of*

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relevant to this matter before the D.C. Circuit.[11] Therefore, it too would presumably have a significant interest in the resolution of these jurisdictional issues. The industry as a whole would thus benefit from a ruling from the Court of Appeals, for not only will the resolution of these issues be dispositive of the cases before this Court, but it will provide persuasive authority for courts in other jurisdictions, as well as for the FCC.

II. Substantial Ground for Difference of Opinion

A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits. *See City Stores Co. v. Lerner Shops*, 410 F.2d 1010, 1011 (D.C. Cir. 1969); *see also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 212 F.Supp.2d 903, 909-10 (S.D. Ind. 2002) (certification is appropriate where other courts have adopted

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1996, CC Docket No. 96-128, 2003 FCC LEXIS 5370 (Oct. 3, 2003). In fact, APCC currently has a dial-around compensation claim pending before the FCC. *See APCC v. Verizon Communications, Inc.*, FCC File No. EB-02-MDIC-0082.

[11] *See, e.g., Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001); *Global Crossing Telecomm., Inc. v. FCC*, 259 F.3d 740 (D.C. Cir. 2001); *APCC v. FCC*, 215 F.3d 51 (D.C. Cir. 2000); *MCI Telecomm. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); and *MCI Telecomm. Corp v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995).

conflicting positions regarding the issue of law proposed for certification). A substantial ground for dispute also exists where a court's challenged decision conflicts with decisions of several other courts. *See Pub. Interest Research Group v. Hercules, Inc.,* 830 F.Supp. 1549, 1556 (D.N.J. 1993).

"The mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to show that there is no ground for difference of opinion." *Vitamins,* 2000 WL 33142129, at *2 (citing *Daetwyler Corp. v. Meyer,* 575 F.Supp. 280, 283 (E.D. Pa. 1983)). Instead, a court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute. *Id.* Where "proceedings that threaten to endure for several years depend on an initial question of jurisdiction * * * or the like," certification may be justified even if there is a relatively low level of uncertainty. 16 Wright & Miller, Federal Practice & Procedure, § 3930 at 422 (1996); *see also Atl. City Elec. Co. v. Gen. Elec. Co.,* 207 F.Supp. 613, 620 (S.D.N.Y. 1962) (when there are reasons to conclusively and expeditiously determine an issue, a narrow approach is unjustified in determining whether there is a substantial ground for difference of opinion).

Although this Court believes that its prior decisions relating to the existence of a private right of

action under the Communications Act and the standing of the plaintiffs-assignees are correct,[12] it also recognizes the arguments in support of contrary conclusions are not insubstantial. With respect to the private right of action, the Ninth Circuit in *Greene* found that since § 276 does not establish a right to compensation from common carriers, the complaint must be dismissed. 340 F.3d at 1052.[13] In so holding, the Ninth Circuit found that there was no basis for finding either an explicit or implied private right of action under sections 206, 207 or 276. In rendering its decision, the Court relied on the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), as did this Court (*see* 281 F.Supp.2d at 55), but its more restrictive analysis of *Sandoval* led it to find no private right of action. Moreover, its ruling explicitly rejected the reasoning of the one case upon which this Court relied (*see C & W*, 281 F.Supp.2d at 56) – *Precision*

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[12] In this regard, it is noteworthy that after *Greene*, the FCC issued an Order that recognized that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, 2003 FCC LEXIS 5370, ¶ 32 (Oct. 3, 2003).

[13] While *Greene* was issued a week before this Court's decision in *C & W*, this Court was unaware of the *Greene* decision as the parties here, who were also involved in *Greene*, failed to bring it to the Court's attention.

Pay Phones v. Qwest Communications Corp., 210 F.Supp.2d 1106, 1115 (N.D. Cal.2002) – on the grounds that the California district court had incorrectly found a statutory right to fair compensation. *See Greene*, 340 F.3d at 1051 n. 4. Given the absence of any authority in this jurisdiction regarding this issue,[14] and an unanimous decision from an appellate court in another circuit on the same issue, a finding of a substantial difference of opinion as to whether the Communications Act provides for a private right of action is warranted.[15]

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[14] As this Court noted in *C & W*, this Circuit's decision in *MCI*, while relevant and instructive, does not resolve the issue here, since *MCI* involved a challenge to an FCC order, not a suit between private parties. *C & W*, 281 F.Supp.2d at 55.

[15] Arguably, the Ninth Circuit's analysis in *Greene* also provides persuasive authority to deny plaintiffs' request to amend their complaints to add claims under §§ 201(b), 407 and 416(c). As this Court noted, these claims "appear not to add anything to plaintiffs' case beyond what is already covered by the claims expressly based on section 276" (*C & W*, 281 F.Supp.2d at 58), and thus, Sprint may be correct in arguing that these additional counts constitute nothing more than an attempt to recast plaintiffs' § 276 claim under other provisions of the Act. (Sprint's Mot. at 14.) Moreover, these proposed amendments would contravene *Greene's* observation that:

> a private right of action runs counter to this centralization of function [in the FCC] and to the development of a coherent national communications policy. It would also put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal judges, instead of in the hands of the Commission * * * . The result would be to deprive the

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Similarly, with respect to the issue of Article III standing, there is substantial ground for difference of opinion as reflected by this Court's conflicting rulings in *AT & T I* and *AT & T II*, a recent decision by the Central District of California that found, without opinion, that plaintiffs lacked standing (*In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig,* No. 02-ML-1483 (TJH) (C.D. Cal. August 15, 2003)), and the lack of any case law squarely on point.[16] To the extent that there is a private right of action under the Act, the issue of standing based on an assignment of rights presents a novel issue of whether the assignees can satisfy Article III's requirement of injury-in-fact. (*See* AT & T Mot. at 8) (citing *Raines v. Byrd,* 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (the injury must affect the plaintiff in a personal and individual way).) Defendants also argue, with some persuasiveness, that this Court's ruling would allow parties to evade the requirements for class action certification set forth in Fed.R.Civ.P. 23 and for associational

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FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy.

340 F.3d at 1053 (internal quotations and citations omitted).

[16] Even the Supreme Court has acknowledged that its rulings on standing have been less than clear. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) ("We need not mince words when we say that the concept of 'Article III standing' has not been defined with complete consistency in all the various cases decided by this Court which have discussed it * * * .").

standing established in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). (*See* AT & T's Mot. at 14-15.)

Given these arguments, as well as the lack of any binding precedent, the Court must agree that, to the extent that a private right of action is found to exist, certification of the issue of standing is also warranted.

III. Material Advancement of the Disposition of the Litigation

Plaintiffs filed the first of these cases against AT & T in early 1999. On May 18, 2001, the Court appointed a special master to assist in overseeing the complicated discovery issues that were presented by that case. To date, the docket in the AT & T case contains more than 110 entries, representing a course of protracted litigation that is currently bogged down in discovery and will no doubt consume a significant amount of the parties' resources in the months and years to come. While the four related matters were not filed until 2001 and 2002, they too will undoubtedly present similarly daunting discovery issues.

For instance, as argued by AT & T, the cost of discovery related to the telephone calls alone will exceed any possible damages award, because "there are likely over one billion separate calls to argue

about here."[17] (AT & T's Mot. at 15.) In fact, the parties have already expended a substantial amount of resources attempting to design acceptable protocols to analyze a selected 2000 phone calls and have spent more than $1 million relating to document discovery. (*See* AT & T's Mot. at 19; AT & T's Reply at 11 n. 5.) And, although significant efforts have been made to gather discovery, AT & T claims that because of the sheer volume of information involved, neither plaintiffs nor the carriers have any rational basis upon which to evaluate possible settlement – more than four years after the filing of the suit. (*See* AT & T's Mot. at 16.)

An immediate appeal would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed. *See Lemery v. Ford Motor Co.*, 244 F.Supp.2d 720, 728 (S.D. Tex. 2002) ("It would pain the Court to see both attorneys * * * [and parties] proceed to judgment after considerable expense and delay, only to discover that the judgment must be overturned on appeal because the federal judiciary

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[17] AT & T represents that in each case in which the aggregators are named as plaintiffs, each of the 1400 PSPs must demonstrate "that each call for which compensation is sought: (a) was made from their phone; (b) at a time when the local exchange carrier had Flex ANI available [and] operational on that particular line and that [the carrier defendant] received the signal; (c) was carried by [defendant]; (d) was answered by the recipient; and (e) was not paid for by [the carrier]." (AT & T's Mot. at 15.)

lacks subject matter jurisdiction."). Resolution of this question would also assist many other courts in resolving similar disputes. *See Vitamins,* 2000 WL 33142129, at *2. Moreover, although plaintiffs argue correctly that they will be prejudiced by further delays, in the event that it is ultimately found that this Court lacks jurisdiction to litigate these cases, it would be far better for all concerned, including plaintiffs, to have these matters resolved now, as opposed to sometime in the distant future.

Finally, the Court is confident that appellate review of the jurisdictional issues presented satisfies the collateral order doctrine, as it would conclusively resolve important legal issues that are completely separate from the merits of the actions, and these issues will, as a practical matter, be effectively unreviewable following trial because of the enormous expense and time involved.[18] *See GTE New Media Servs. Inc. v. Ameritech Corp.,* 44 F.Supp.2d 313, 316 (D.D.C.1999) ("All indications thus far indicate that to reach final judgment the parties will probably undergo voluminous and burdensome discovery and

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[18] Plaintiffs claim there is a "long line of unambiguous precedent" establishing that the issue of standing is not effectively unreviewable on appeal from a final judgment, and thus fails to satisfy the collateral order doctrine. (Pls.' Opp. to AT & T's Mot. at 25.) This authority, however, establishes only that a party may not, as of right, take immediate interlocutory appeal on the standing issue absent a Rule 54(b) certification from the district court, and thus, is not relevant here. *See Carringer v. Tessmer,* 253 F.3d 1322, 1323 (11th Cir. 2001).

possibly months of trial. To learn after that point, on appeal, that the parties should not have proceeded so far, and at such expense, would make the issue effectively unreviewable on appeal from final judgment.")

CONCLUSION

Interlocutory review is warranted here because the interest in avoiding excessively burdensome and expensive litigation is "significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule." *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003). Although the Court recognizes that the collateral order doctrine should be sparingly invoked, these cases more than qualify for certification under 28 U.S.C. § 1292(b). Moreover, given the need for certification, the Court will grant defendants' request to stay discovery pending appeal, but it expects the parties to seek expedited review in the Court of Appeals.

The Court therefore grants the defendants' request for certification and a stay of discovery pending resolution of the appeal. A separate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the Court on defendant Sprint's Motion to Dismiss Plaintiffs' Second Amended Complaint [], or in the alternative, to certify an

interlocutory appeal. Based on the pleadings, the record, and relevant case law, and for the reasons discussed in the Court's accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion to dismiss is **DENIED**; it is

FURTHER ORDERED that defendant's motion for certification of interlocutory appeal is **GRANTED**; and it is

FURTHER ORDERED that *APCC Servs., Inc. v. Cable & Wireless, Inc.*, 281 F.Supp.2d 52 (D.D.C. 2003) and *APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C. 2003) are certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) as they involve controlling questions of law as to which there is a substantial ground for difference of opinion, and an immediate appeal therefrom may materially advance the ultimate termination of this litigation; and it is

FURTHER ORDERED that discovery in the case is stayed pending action by the Court of Appeals.

SO ORDERED.

United States District Court,
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A.99-0696 ESH.
v.	*	Dec. 17, 2003
AT&T CORPORATION,	*	
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

Plaintiffs in this case, as well as in several others before the Court, seek payment from common carriers of "dial-around compensation" on behalf of payphone service providers ("PSPs") for certain long distance phone calls originating from their payphones.[1] They claim that the carriers have violated section 276(b)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. § 276, and its implementing regulations, codified at 47 C.F.R. § 64.1300. Plaintiffs

[1] Pending before this Court are four additional cases that raise nearly identical issues: *APCC Servs., Inc. v. Sprint Communications Co.*, Civ. No. 01-0642 (D.D.C.); *CFL v. AT & T Corp.*, Civ. No. 01-1531 (D.D.C.); *APCC Servs., Inc. v. WorldCom*, Civ. No. 01-0638 (D.D.C.) (stayed pending bankruptcy); and *APCC Servs., Inc. v. Cable and Wireless, Inc.*, Civ. No. 02-0158 (D.D.C.) (stayed pursuant to Cable & Wireless's suggestion of bankruptcy filed on December 10, 2003).

base their claims on sections 206 and 207 that provide for the recovery of damages for violations of the Act.

All of the cases before this Court present an initial question as to whether section 276 and its implementing regulations confer a private right of action to sue for a common carrier's alleged failure to pay adequate dial-around compensation. On September 4, 2003, the Court, upon motion to dismiss by Cable & Wireless, found that plaintiffs have a right of action and can base their claims on section 276. *APCC Servs., Inc. v. Cable & Wireless, Inc.*, 281 F.Supp.2d 52 (D.D.C.2003) ("*C & W*"). Consistent with that ruling, the Court also allowed plaintiffs to amend their complaint to add additional grounds under sections 201(b), 416(c) and 407 of the Communications Act.[2] *Id.* at 57-59. Sprint has requested that the Court reconsider its rulings and dismiss the amended complaint, or alternatively, certify the question for interlocutory appeal, basing its motion in large part upon the Ninth Circuit's recent holding in *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003).[3]

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[2] Applying its ruling in *C & W*, the Court also denied Sprint's motion to dismiss, and granted plaintiff's motion to amend in *APCC Services, Inc. v. Sprint Communications Co.*, Civ. No. 02-0642 (D.D.C.) (Order issued September 3, 2002).

[3] Raising many of the same arguments against plaintiffs' right to sue that Sprint presents, C & W, prior to filing for bankruptcy, also filed a motion for reconsideration, or in the

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Four of these actions also present a question as to whether plaintiffs have Article III standing as assignees of the claims of numerous PSPs.[4] The Court initially dismissed one of these cases on March 28, 2003, finding that plaintiffs lacked standing (*see APCC Servs., Inc. v. AT & T Corp.*, 254 F.Supp.2d 135 (D.D.C.2003) ("*AT & T I*")), but upon reconsideration, it concluded that the assignments executed by the PSPs bestowed upon the aggregator-plaintiffs standing sufficient to survive an Article III challenge. *See APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C.2003) ("*AT & T II*"). AT & T has moved for reconsideration of the Court's second decision on the standing issue, or in the alternative, for certification of an interlocutory appeal.[5]

Whether the Act confers a private right of action to collect dial-around compensation from carriers is a controlling question of law, for it is dispositive as to all cases before the Court.[6] To the extent that a private

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alternative, for certification of an interlocutory appeal, arguing that there is no private right of action under the Act. Curiously, AT & T, as defendant in two of the cases before the Court, has never challenged the proposition that plaintiffs may sue under the Communications Act for the alleged failure to pay dial-around compensation.

[4] This issue is not presented by *CFL v. AT & T Corp.*, Civ. No. 01-1531 (D.D.C.).

[5] Prior to filing for bankruptcy, C & W also moved for reconsideration of the Court's decision on standing, or in the alternative, for certification of an interlocutory appeal.

[6] Each of the cases is based upon the rights arguably conferred by § 276 and its implementing regulations. One

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right of action is found to exist, the issue of whether the assignees have standing to sue is also controlling, and is dispositive as to three of the five pending actions.[7] An immediate appeal to the Circuit Court of these issues will prevent potentially unnecessary and protracted litigation while definitively resolving these disputed jurisdictional issues. Thus, although the Court is unwilling to reconsider its prior opinions in *C & W* and *AT & T II*, it will grant the carriers' motions for certification of an interlocutory appeal of both decisions.

LEGAL ANAYLSIS

Whether to allow an interlocutory appeal of a non-final order is left to the discretion of the district court. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). The court may certify such an appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the

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plaintiff (Peoples Telephone Company) in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696, has brought a breach of contract claim as well, but the Court has no diversity jurisdiction over that claim, so without a private right of action under the Communications Act, the Court would have no basis to exercise jurisdiction over the contract claim.

[7] There are a limited number of non-assignee plaintiffs named in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696 (D.D.C.), and *CFL v. AT & T Corp.*, Civ. No. 01-1531 (D.D.C.), that would be unaffected by a decision that the assignee-plaintiffs lack standing.

ruling exists; and (3) an immediate appeal would materially advance the litigation. *See* 28 U.S.C. § 1292(b); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n. 2 (D.C. Cir. 1986); *In re Korean Air Lines Disaster*, 935 F.Supp. 10, 16 (D.D.C.1996). The party seeking interlocutory review has the burden of persuading the Court that the "circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 33142129, at *1 (D.D.C.2000) (citing *First Am. Corp. v. Al-Nahyan*, 948 F.Supp. 1107, 1116 (D.D.C.1996)).

In deciding whether to grant interlocutory appeal, the Court of Appeals in this Circuit follows the collateral order doctrine, *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1026 (D.C. Cir. 1997), which allows for appeal if it "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) would be effectively unreviewable on appeal from a final judgment." *United States v. Rostenkowski*, 59 F.3d 1291, 1296 (D.C. Cir. 1995) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)).

I. Controlling Question of Law

Under § 1292(b), a "controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation

with resulting savings of the court's or the parties' resources." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group,* 233 F.Supp.2d 16, 19 (D.D.C.2002). Controlling questions of law include issues that would terminate an action if the district court's order were reversed. *See Klinghoffer v. S.N.C. Achille Lauro,* 921 F.2d 21, 24 (2d Cir. 1990) (a question of law is controlling if it involves issues of personal or subject matter jurisdiction); *United States ex rel. Wis. v. Dean,* 729 F.2d 1100, 1103 (7th Cir. 1984) (decision finding subject matter jurisdiction involves a controlling question of law); *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 755 (3d Cir. 1974) (a question is "controlling" if error in its resolution would warrant dismissal).

The resolution of an issue need not necessarily terminate an action in order to be "controlling," *Klinghoffer,* 921 F.2d at 24, but instead may involve a procedural determination that may significantly impact the action. *See In re The Duplan Corp.,* 591 F.2d 139, 148 n. 11 (2d Cir. 1978) (a "controlling question of law" includes procedural determination affecting the conduct of an action); *Judicial Watch,* 233 F.Supp.2d at 19 (citing *Johnson v. Burken,* 930 F.2d 1202, 1206 (7th Cir. 1991) (a question of law can be controlling if it determines the outcome "or even the future course of the litigation")); *see also* 16 Wright, Miller & Cooper, Federal Practice & Procedure, § 3930 at 426 (1996) ("A steadily growing number of decisions * * * have accepted the better view that a question is controlling * * * if interlocutory

reversal might save time for the district court, and time and expense for the litigants."). The impact that the appeal will have on other cases is also a factor supporting a conclusion that the question is controlling. *See Klinghoffer,* 921 F.2d at 24 (citing *Brown v. Bullock,* 294 F.2d 415, 417 (2d Cir. 1961) (leave to appeal granted in part because the "determination was likely to have precedential value for a large number of other suits")); *Genentech, Inc. v. Novo Nordisk A/S,* 907 F.Supp. 97, 99 (S.D.N.Y.1995) (a question is "controlling" if it affects a large number of cases).

Whether the Communications Act provides a private right of action to collect dial-around compensation is a controlling and dispositive question in each of the five cases, as reversal of the Court's finding would definitively terminate these actions. *See Masri v. Wakefield,* 602 F.Supp. 404, 406 (D.Colo.1983) (certifying question as to statutory private right of action). Similarly, if a private right of action is found to exist, the second jurisdictional issue of whether the assignee-plaintiffs have standing is also a controlling question of law. *See Klapper v. Commonwealth Realty Trust,* 662 F.Supp. 235, 236 (D.Del.1987).[8] Although claims by individual PSPs,

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[8] Plaintiffs incorrectly argue that because a determination of standing presents a mixed question of law and fact, certification would not be appropriate under section 1292(b). (*See* Pls.' Opp. to AT & T's Mot. at 21.) There is no dispute regarding the contents of the assignments at issue here, and thus, there is no factual dispute that would convert the legal question of standing

(Continued on following page)

which are limited in number, may survive the assignees' dismissal for lack of standing, assignee standing is a procedural determination that will significantly impact the form and conduct of these actions. Moreover, because the Court should not speak to any matter over which it lacks jurisdiction, the issue is controlling. *See In re Sealed Case,* 131 F.3d 208, 210 (D.C. Cir. 1997) ("If we are without subject-matter jurisdiction over the case ostensibly before us, then any pronouncement on any issue * * * becomes a violation of our Article III limitations.").

It is also significant that in addition to the five cases here, PSPs and aggregators have filed numerous suits throughout the country against common carriers based on a claim of a private right of action under the Communications Act, as well as an assertion of standing based on assignments executed by the PSPs.[9] Despite the rash of these cases countrywide, the

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into a mixed question of law and fact. Rather, the problem is how the jurisprudence involving Article III standing should be applied to the undisputed facts.

[9] The Court discussed many of these cases in its Memorandum Opinion issued in *APCC Servs., Inc. v. WorldCom, Inc.*, Civ. No. 01-638, 2001 U.S. Dist. LEXIS 23988, -22 (D.D.C. Dec. 21, 2001). For instance, suits have been filed in federal courts in Utah (*Flying J, Inc. v. Sprint Communications Co.*, Civ. No. 99-111-ST (D. Utah)), Virginia (*APCC v. VoCall Communications, Corp.* (E.D. Va.)), Pennsylvania (*see Phone-Tel Communications, Inc. v. AT & T Corp.*, 100 F. Supp 2d 313, 322 (E.D. Pa.2000)), Arizona (*GCB Communications, Inc. v. WorldCom, Inc.*, Civ. No. 00-1216 (D. Ariz.)), Texas (*see Phonetel Techs., Inc. v. Network Enhanced Telecom,* 197 F.Supp.2d 720 (E.D. Tex.2002)), Cali-

(Continued on following page)

parties in the cases in this jurisdiction are the major players in almost all the litigation countrywide, and the assignee-plaintiffs represent more than 400,000 of the 500,000 to 600,000 payphone lines in the United States. Moreover, the FCC, a frequent party before the D.C. Circuit, has dealt with cases similar to these[10] and has litigated issues relevant to this matter before the D.C. Circuit.[11] Therefore, it too would presumably have a significant interest in the resolution of these jurisdictional issues. The industry

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fornia (*see, e.g., In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig.*, No. 02-ML-1483 (C.D. Cal.) (TJH) and cases collected in *C & W*, 281 F.Supp.2d at 54). Although some of these actions have been settled or dismissed, definitive resolution of the issues before the Court could have an impact on those cases that are still pending.

[10] *See, e.g., Bell Atlantic-Delaware, Inc. v. MCI Telecomms. Corp.*, 17 F.C.C.R. 15, 918, 15, 919 (¶ 3), 2002 WL 1842441 (2002); *Flying J. Inc. and TON Services, Inc.*, Petition for Expedited Declaratory Ruling Regarding a Primary Jurisdiction Referral from the United States District Court for the District of Utah, Northern Division, Memorandum Opinion and Order, CCB/CPD No. 00-04, FCC 03-108, 2003 WL 21057292 (May 9, 2003); *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, 2003 FCC LEXIS 5370, 2003 WL 22283556 (Oct. 3, 2003). In fact, APCC currently has a dial-around compensation claim pending before the FCC. *See APCC v. Verizon Communications, Inc.*, FCC File No. EB-02-MDIC-0082.

[11] *See, e.g., Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001); *Global Crossing Telecomm., Inc. v. FCC*, 259 F.3d 740 (D.C. Cir. 2001); *APCC v. FCC*, 215 F.3d 51 (D.C. Cir. 2000); *MCI Telecomm. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); and *MCI Telecomm. Corp v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995).

as a whole would thus benefit from a ruling from the Court of Appeals, for not only will the resolution of these issues be dispositive of the cases before this Court, but it will provide persuasive authority for courts in other jurisdictions, as well as for the FCC.

II. Substantial Ground for Difference of Opinion

A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits. *See City Stores Co. v. Lerner Shops,* 410 F.2d 1010, 1011 (D.C. Cir. 1969); *see also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.,* 212 F.Supp.2d 903, 909-10 (S.D.Ind.2002) (certification is appropriate where other courts have adopted conflicting positions regarding the issue of law proposed for certification). A substantial ground for dispute also exists where a court's challenged decision conflicts with decisions of several other courts. *See Pub. Interest Research Group v. Hercules, Inc.,* 830 F.Supp. 1549, 1556 (D.N.J.1993).

"The mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to show that there is no ground for difference of opinion." *Vitamins,* 2000 WL 33142129, at *2 (citing *Daetwyler Corp. v. R. Meyer,* 575 F.Supp. 280, 283 (E.D. Pa.1983)). Instead, a court faced with a motion for certification must analyze the strength of the arguments in opposition to the

challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute. *Id.* Where "proceedings that threaten to endure for several years depend on an initial question of jurisdiction * * * or the like," certification may be justified even if there is a relatively low level of uncertainty. 16 Wright, Miller & Cooper, Federal Practice & Procedure, § 3930 at 422 (1996); *see also Atl. City Elec. Co. v. Gen. Elec. Co.*, 207 F.Supp. 613, 620 (S.D.N.Y.1962) (when there are reasons to conclusively and expeditiously determine an issue, a narrow approach is unjustified in determining whether there is a substantial ground for difference of opinion).

Although this Court believes that its prior decisions relating to the existence of a private right of action under the Communications Act and the standing of the plaintiffs-assignees are correct,[12] it also recognizes the arguments in support of contrary conclusions are not insubstantial. With respect to the private right of action, the Ninth Circuit in *Greene* found that since § 276 does not establish a right to

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[12] In this regard, it is noteworthy that after *Greene*, the FCC issued an Order that recognized that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, 2003 FCC LEXIS 5370, ¶ 32, 2003 WL 22283556 (Oct. 3, 2003).

compensation from common carriers, the complaint must be dismissed. 340 F.3d at 1052.[13] In so holding, the Ninth Circuit found that there was no basis for finding either an explicit or implied private right of action under sections 206, 207 or 276. In rendering its decision, the Court relied on the Supreme Court's decision in *Alexander v. Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), as did this Court (*see* 281 F.Supp.2d at 55), but its more restrictive analysis of *Sandoval* led it to find no private right of action. Moreover, its ruling explicitly rejected the reasoning of the one case upon which this Court relied (*see C & W,* 281 F.Supp.2d at 56) – *Precision Pay Phones v. Qwest Communications Corp.,* 210 F.Supp.2d 1106, 1115 (N.D.Cal.2002) – on the grounds that the California district court had incorrectly found a statutory right to fair compensation. *See Greene,* 340 F.3d at 1051 n. 4. Given the absence of any authority in this jurisdiction regarding this issue,[14] and an unanimous decision from an appellate court in another circuit on the same issue, a finding of a substantial difference of opinion as to whether

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[13] While *Greene* was issued a week before this Court's decision in *C & W,* this Court was unaware of the *Greene* decision as the parties here, who were also involved in *Greene,* failed to bring it to the Court's attention.

[14] As this Court noted in *C & W,* this Circuit's decision in *MCI,* while relevant and instructive, does not resolve the issue here, since *MCI* involved a challenge to an FCC order, not a suit between private parties. *C & W,* 281 F.Supp.2d at 55.

the Communications Act provides for a private right of action is warranted.[15]

Similarly, with respect to the issue of Article III standing, there is substantial ground for difference of opinion as reflected by this Court's conflicting rulings in *AT & T I* and *AT & T II*, a recent decision by the Central District of California that found, without opinion, that plaintiffs lacked standing (*In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig*, No. 02-ML-1483 (TJH) (C.D. Cal. August 15, 2003)), and the lack of any case law

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[15] Arguably, the Ninth Circuit's analysis in *Greene* also provides persuasive authority to deny plaintiffs' request to amend their complaints to add claims under §§ 201(b), 407 and 416(c). As this Court noted, these claims "appear not to add anything to plaintiffs' case beyond what is already covered by the claims expressly based on section 276" (*C & W*, 281 F.Supp.2d at 58), and thus, Sprint may be correct in arguing that these additional counts constitute nothing more than an attempt to recast plaintiffs' § 276 claim under other provisions of the Act. (Sprint's Mot. at 14.) Moreover, these proposed amendments would contravene *Greene's* observation that:

> a private right of action runs counter to this centralization of function [in the FCC] and to the development of a coherent national communications policy. It would also put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal judges, instead of in the hands of the Commission * * * . The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy.

340 F.3d at 1053 (internal quotations and citations omitted).

squarely on point.[16] To the extent that there is a private right of action under the Act, the issue of standing based on an assignment of rights presents a novel issue of whether the assignees can satisfy Article III's requirement of injury-in-fact. (*See* AT & T Mot. at 8) (citing *Raines v. Byrd,* 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)) (the injury must affect the plaintiff in a personal and individual way). Defendants also argue, with some persuasiveness, that this Court's ruling would allow parties to evade the requirements for class action certification set forth in Fed.R.Civ.P. 23 and for associational standing established in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). (*See* AT & T's Mot. at 14-15.)

Given these arguments, as well as the lack of any binding precedent, the Court must agree that, to the extent that a private right of action is found to exist, certification of the issue of standing is also warranted.

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[16] Even the Supreme Court has acknowledged that its rulings on standing have been less than clear. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.,* 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) ("We need not mince words when we say that the concept of 'Article III standing' has not been defined with complete consistency in all the various cases decided by this Court which have discussed it * * * ").

III. Material Advancement of the Disposition of the Litigation

Plaintiffs filed the first of these cases against AT & T in early 1999. On May 18, 2001, the Court appointed a special master to assist in overseeing the complicated discovery issues that were presented by that case. To date, the docket in the AT & T case contains more than 110 entries, representing a course of protracted litigation that is currently bogged down in discovery and will no doubt consume a significant amount of the parties' resources in the months and years to come. While the four related matters were not filed until 2001 and 2002, they too will undoubtedly present similarly daunting discovery issues.

For instance, as argued by AT & T, the cost of discovery related to the telephone calls alone will exceed any possible damages award, because "there are likely over *one billion* separate calls to argue about here."[17] (AT & T's Mot. at 15.) In fact, the parties have already expended a substantial amount of resources attempting to design acceptable protocols to analyze a selected 2000 phone calls and have spent

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[17] AT & T represents that in each case in which the aggregators are named as plaintiffs, each of the 1400 PSPs must demonstrate "that each call for which compensation is sought: (a) was made from their phone; (b) at a time when the local exchange carrier had Flex ANI available [and] operational on that particular line and that [the carrier defendant] received the signal; (c) was carried by [defendant]; (d) was answered by the recipient; and (e) was not paid for by [the carrier]." (AT & T's Mot. at 15.)

more than $1 million relating to document discovery. (*See* AT & T's Mot. at 19; AT & T's Reply at 11 n. 5.) And, although significant efforts have been made to gather discovery, AT & T claims that because of the sheer volume of information involved, neither plaintiffs nor the carriers have any rational basis upon which to evaluate possible settlement – more than four years after the filing of the suit. (*See* AT & T's Mot. at 16.)

An immediate appeal would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed. *See Lemery v. Ford Motor Co.*, 244 F.Supp.2d 720, 728 (S.D.Tex.2002) ("It would pain the Court to see both attorneys * * * [and parties] proceed to judgment after considerable expense and delay, only to discover that the judgment must be overturned on appeal because the federal judiciary lacks subject matter jurisdiction."). Resolution of this question would also assist many other courts in resolving similar disputes. *See Vitamins*, 2000 WL 33142129, at *2. Moreover, although plaintiffs argue correctly that they will be prejudiced by further delays, in the event that it is ultimately found that this Court lacks jurisdiction to litigate these cases, it would be far better for all concerned, including plaintiffs, to have these matters resolved now, as opposed to sometime in the distant future.

Finally, the Court is confident that appellate review of the jurisdictional issues presented satisfies the collateral order doctrine, as it would conclusively

resolve important legal issues that are completely separate from the merits of the actions, and these issues will, as a practical matter, be effectively unreviewable following trial because of the enormous expense and time involved.[18] *See GTE New Media Servs. Inc. v. Ameritech Corp.*, 44 F.Supp.2d 313, 316 (D.D.C.1999) ("All indications thus far indicate that to reach final judgment the parties will probably undergo voluminous and burdensome discovery and possibly months of trial. To learn after that point, on appeal, that the parties should not have proceeded so far, and at such expense, would make the issue effectively unreviewable on appeal from final judgment.")

CONCLUSION

Interlocutory review is warranted here because the interest in avoiding excessively burdensome and expensive litigation is "significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule." *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003). Although the Court recognizes that the collateral

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[18] Plaintiffs claim there is a "long line of unambiguous precedent" establishing that the issue of standing is not effectively unreviewable on appeal from a final judgment, and thus fails to satisfy the collateral order doctrine. (Pls.' Opp. to AT & T's Mot. at 25.) This authority, however, establishes only that a party may not, as of right, take immediate interlocutory appeal on the standing issue absent a Rule 54(b) certification from the district court, and thus, is not relevant here. *See Carringer v. Tessmer*, 253 F.3d 1322, 1323 (11th Cir. 2001).

order doctrine should be sparingly invoked, these cases more than qualify for certification under 28 U.S.C. § 1292(b). Moreover, given the need for certification, the Court will grant defendants' request to stay discovery pending appeal, but it expects the parties to seek expedited review in the Court of Appeals.

The Court therefore grants the defendants' request for certification and a stay of discovery pending resolution of the appeal. A separate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the Court on defendant AT & T's Motion for Reconsideration or, in the Alternative, for Certification of an Interlocutory Appeal. Based on the pleadings, the record, and relevant case law, and for the reasons discussed in the Court's accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion for reconsideration is **DENIED**; it is

FURTHER ORDERED that defendant's motion for certification of interlocutory appeal is **GRANTED**; and it is

FURTHER ORDERED that *APCC Servs., Inc. v. Cable & Wireless, Inc.*, 281 F.Supp.2d 52 (D.D.C.2003) and *APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C.2003) are certified for immediate appeal

pursuant to 28 U.S.C. § 1292(b) as they involve controlling questions of law as to which there is a substantial ground for difference of opinion, and an immediate appeal therefrom may materially advance the ultimate termination of this litigation; and it is

FURTHER ORDERED that discovery in the case is stayed pending action by the Court of Appeals, and the Clerk shall administratively close this case pending appeal.

SO ORDERED.

United States District Court,
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A.99-0696 ESH
v.	*	Sept. 3, 2003
AT& T CORPORATION,	*	
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

On March 28, 2003, this Court dismissed claims brought by five of six plaintiffs against AT & T for payment of dial-around compensation allegedly owed to the payphone service providers ("PSPs") that plaintiffs represent.[1] The Court concluded that it lacked subject matter jurisdiction, finding that plaintiffs lacked Article III standing based on either the assignments executed by the PSPs or the doctrine of associational standing.[2] *See APCC Services, Inc. v.*

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[1] This issue has spawned two other suits currently pending in this Court. *APCC Services, Inc. v. Cable & Wireless, Inc.*, Civ. No. 02-158; *APCC Services, Inc. v. Sprint Communications Co.*, Civ. No. 01-642.

[2] The Court's Memorandum Opinion and Order in *APCC I* was directed only to the aggregator plaintiffs and not plaintiff Peoples Telephone Company, which is the only plaintiff in this matter that has brought an action on its own behalf. Thus, for

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AT & T Corp., 254 F.Supp.2d 135 (D.D.C. 2003) [hereinafter "*APCC I*"]. In response to this decision, the aggregator plaintiffs have now filed a Motion for Reconsideration ["Mot. for Recons."] and a Motion for Leave to Amend Complaint. Plaintiff Peoples Telephone Company has also filed a Motion for Leave to Amend.

In their Motion for Reconsideration, plaintiffs cite, for the first time, a host of authorities that recognize the validity of an assignment for collection and that offer a principled basis for differentiating an assignment of title to a claim, which vests assignees with legally enforceable rights, from an assignment merely of the right to bring suit, which does not. These authorities persuasively distinguish the instant matter from *Connecticut v. Physicians Health Services of Connecticut. Inc.*, 287 F.3d 110 (2d Cir.2002) – the primary case on which the Court relied in its prior Memorandum Opinion. The Court therefore no longer believes that this case can be decided based on *Physicians Health*, and instead will hold that the aggregator plaintiffs have standing based on the assignments from the PSPs they represent. Because the Court is vacating its March 28, 2003 Memorandum Opinion, it need not reach plaintiffs' motions to amend. It must, however, address defendant's challenge to the validity of plaintiff APCC

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the purposes of this Memorandum Opinion, the term "plaintiffs" excludes Peoples Telephone Company except where it is explicitly referenced.

Services' assignments under Virginia law. The Court finds this challenge to be unavailing. Accordingly, defendant's Motion to Dismiss Assignee Plaintiffs' Claims will be denied.

BACKGROUND

Plaintiffs APCC Services, Inc., Data Net Systems, LLC, Jaroth, Inc. d/b/a Pacific Telemanagement Services, NSC Telemanagement Corp., Davel Communications Group, Inc., and Peoples Telephone Company, Inc. filed this action pursuant to sections 206 and 207 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 206, 207, on behalf of more than one thousand PSPs that own and operate over 400,000 public payphones throughout the United States.[3] (First Amended Complaint ["Am. Compl."] ¶¶ 1, 11.) Five of the six plaintiffs are "aggregators," or clearinghouses, created to streamline the billing and collection of dial-around compensation from common carriers of telephone calls, like defendant, who are subject to the compensation payment obligations mandated by section 276 of the Act. (*Id.* ¶ 10.) Pursuant to section 276, defendant is required to compensate PSPs for completed access code and toll

[3] PSPs own, install, operate, manage, or maintain payphone services and facilities which enable callers to access the telephone network when away from their home or office. They recover the cost of the payphone services and facilities by receiving payment for their use from callers or from carriers. (Am. Compl.¶ 14.)

free calls that are made using PSPs' payphones and carried over defendant's telephone network facilities. (*Id.* ¶ 1.) PSPs contract with aggregators to facilitate the billing and payment process.

Plaintiffs bring this suit as assignees of the claims of the PSPs they represent. The assignments provide that each PSP "assigns, transfers and sets over to [plaintiff] for purposes of collection all rights, title and interest of the [PSP] in the [PSP]'s claims, demands or causes of action for 'Dial-Around Compensation.'" (AT & T's Motion to Dismiss Assignee Plaintiffs' Claims ["AT & T Mot. to Dismiss"] Ex. A at 1.)[4] The assignments do not give plaintiffs the right to retain or share in any proceeds of the litigation. (*Id.*)

In January 2003, defendant filed a motion to dismiss for lack of subject matter jurisdiction, which challenged plaintiffs' standing to bring suit. Defendant argued that as assignees of the PSPs, plaintiffs did not suffer an injury-in-fact of their own and did not have a personal stake in the outcome of the litigation. Defendant further argued that even if plaintiffs have standing, APCC Services' claims cannot be assigned under applicable state law, and therefore, the assignments are invalid. Because the Court concluded that plaintiffs did not have standing

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[4] During discovery, plaintiffs produced nearly 1,300 identical assignments from the PSPs they represent. (AT & T's Memorandum in Support of its Motion to Dismiss Assignee Plaintiffs' Claims at 2 n. 2.)

to sue, it did not reach the validity of APCC Services' assignments. *See APCC I,* 254 F.Supp.2d at 138. Defendant's motion was granted and the claims asserted by the aggregator plaintiffs were dismissed. *Id.* at 144.

Plaintiffs have now moved the Court to reconsider its decision or, alternatively, for leave to amend their complaint to substitute several independent payphone service providers to act as class representatives or to name all independent payphone service providers on whose behalf suit was initially brought. Plaintiff Peoples Telephone Company has also filed a similar motion for leave to amend. Defendant opposes these motions, arguing that plaintiffs are procedurally barred from moving for reconsideration; that the Court's prior finding of lack of standing is correct; and that leave to amend may not be granted given the lack of subject matter jurisdiction.

LEGAL ANALYSIS

I. Rule 54(b) Standard

Plaintiffs request the Court to reconsider its March 28, 2003 Memorandum Opinion and Order pursuant to Fed. R. Civ. P. 54(b). Under Rule 54(b), when multiple parties are involved in a case and an order adjudicating fewer than all the claims is issued, the order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties" unless the court has directed the entry of final judgment as to

the particular claims addressed by the order. Fed. R. Civ. P. 54(b). Thus, Rule 54(b) "addresses interlocutory judgments." *Campbell v. United States Dep't of Justice,* 231 F.Supp.2d 1, 6 n. 8 (D.D.C. 2002). "Reconsideration of an interlocutory decision is available under the standard, 'as justice requires.'" *Id.* at 7 (quoting *Childers v. Slater,* 197 F.R.D. 185, 190 (D.D.C. 2000)). That standard "differs from the standards applied to final judgments under Federal Rules of Civil Procedure 59(e) and 60(b)," where the Court must find "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Id.* In arguing that the stricter standard of Rule 60(b) should be applied, defendant disregards this important distinction.[5]

The Court's March 28, 2003 ruling did not dispose of the entire matter as it did not involve one of the plaintiffs – Peoples Telephone Company. Nor did the Court expressly direct the entry of final judgment with respect to the claims addressed. Consequently, the order is interlocutory, and it may be revised where "justice requires." *See* Fed.R.Civ.P. 60(b) Advisory

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[5] Defendant relies on two cases that apply the stricter standard but do not specify the rules under which the moving party requested reconsideration. *See Regency Communications, Inc. v. Cleartel Communications, Inc.,* 212 F.Supp.2d 1, 3 (D.D.C. 2002); *Cobell v. Norton,* 263 F.Supp.2d 58, 64 (D.D.C. 2003). Both cases were decided after *Campbell,* and neither challenges the view that a court may grant a motion to reconsider pursuant to Rule 54(b) "as justice requires."

Comm. Notes ("[I]nterlocutory judgments are not brought within the restrictions of [Rule 60(b)], but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires."); *see also Childers,* 197 F.R.D. at 190.

II. Plaintiffs' Standing as Assignees

In *APCC I,* the Court was persuaded by defendant's argument that plaintiffs lacked standing because they were required to remit any damages to the PSPs, and thus, did not have a concrete stake in the outcome of the litigation. In opposition, plaintiffs relied almost exclusively on *Vermont Agency of Natural Resources v. United States,* 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), arguing that the Supreme Court's decision in that case enshrines the principle that all assignments confer standing. Rejecting plaintiffs' overly expansive reading of *Vermont Agency,* the Court granted defendant's motion. While the Court remains of the view that *Vermont Agency* alone does not decide this case, plaintiffs have now presented more convincing authority for their position and have persuaded the Court that it was in error when it concluded that plaintiffs lacked standing. In particular, and as discussed below, plaintiffs have successfully differentiated the assignments at issue here, which convey legal title in the dial-around compensation claims, from those in *Physicians Health,* which conveyed merely the power of attorney to bring suit. Moreover, plaintiffs have established

that the requirement that assignees ultimately account to assignors for any relief awarded is irrelevant in determining whether plaintiffs have a sufficient personal interest in the controversy to acquire standing. Accordingly, the Court concludes that it is in the interest of justice to reconsider and to vacate its March 28, 2003 Memorandum Opinion and Order.

A. Assignments for Collection

In their motion for reconsideration, plaintiffs present cogent arguments in support of their standing that go well beyond their initial reliance on *Vermont Agency*. Most importantly, they have for the first time now cited a long line of cases and legal treatises that recognize a well-established principle that assignees for collection purposes are entitled to bring suit where the assignments transfer absolute title to the claims. (Mot. for Recons. at 11, 14.)

This right was explicitly recognized by the Supreme Court when it upheld the right of an assignee for collection to bring suit – even where the remedy awarded was obtained for the benefit of the assignors. *Spiller v. Atchison*, 253 U.S. 117, 40 S.Ct. 466, 64 L.Ed. 810 (1920). *Spiller* involved a suit brought by the assignee of 2,000 shippers complaining that certain railroads were charging excessive rates on the interstate shipment of cattle in violation of the requirements of the Interstate

Commerce Act.[6] The Supreme Court upheld Spiller's right to bring suit to recover damages awarded to cattle shippers under a reparation order made by the Interstate Commerce Commission for unlawful freight overcharges on cattle shipments based on assignments from those cattle shippers.

> The assignments were absolute in form and plainly their effect * * * was to vest the legal title in Spiller. What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award or reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments.

Id. at 134, 40 S.Ct. 466. The Supreme Court thus found that the assignments conferred upon Spiller a sufficient interest in the claims to entitle him to bring suit even though he was obligated to remit the proceeds of the suit to the shippers that had assigned their claims.

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[6] It is worth pointing out that the illegal charge provisions in the ICA under which Spiller recovered became the model for the comparable provisions in the Communications Act under which the present plaintiffs seek to recover. *See AT & T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 221-22, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998).

Similarly, in *Titus v. Wallick*, 306 U.S. 282, 59 S.Ct. 557, 83 L.Ed. 653 (1939), the Supreme Court ruled that assignments transferring "all right, title and interest" in a claim gave petitioner the right to bring suit even though a separate agreement between the assignor and petitioner required that petitioner turn over the proceeds of the claim to the assignor. *Id.* at 286, 59 S.Ct. 557. In reaching this conclusion, the Supreme Court observed:

> [A]ny form of assignment which purports to assign or transfer a chose in action confers upon the transferee such title or ownership as will enable him to sue upon it. This is true even though the assignment is for the purpose of suit only and the transferee is obligated to account for the proceeds of suit to his assignor.

Id. at 289, 59 S.Ct. 557. It is thus well settled that the validity of an assignment (and therefore the status of the assignee as the real party in interest under Fed. R. Civ. P. 17)[7] is not affected by the "parties' additional agreement that the transferee will be

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[7] Rule 17(a) requires that "[e]very action . . . be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). The rule ensures that an action will be brought by the person who is entitled to enforce the right under the governing substantive law. *See* 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1543 (2d ed.1990). Rule 17(a) does not, however, require that suit "be brought in the name of the person who ultimately will benefit from the recovery." *Id.*

obligated to account for the proceeds of a suit brought on the claim." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir.1997); *see also United States ex rel. Wolther v. N.H. Fire Ins.*, 173 F.Supp. 529, 537 (E.D.N.Y.1959) ("[A]n assignee is the real party in interest * * * if he has some title, legal or equitable, to the thing assigned. The consideration paid, the purpose of the assignment, the use to be made of any proceeds collected, is immaterial.") (quotation omitted); *cf. Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1282 (9th Cir.1983) ("An assignment of claims does not prevent the assignors from receiving the benefits of litigation.").

The critical distinction differentiating between valid and invalid assignments is thus not whether the assignor will ultimately obtain the proceeds of the suit, but rather whether the assignment manifests "an intent to divest the assignor of all control and right to his claim, thereby empowering the assignee to control the cause of action and to receive its fruits." *Advanced Magnetics*, 106 F.3d at 15 (citation and quotation omitted). "An assignee for the purposes of collection holds legal title to the debt and is a real party in interest, even though the assignee must account to the assignor for whatever is recovered in this action." *Airlines Reporting Corp. v. S and N Travel, Inc.*, 857 F.Supp. 1043, 1047 (E.D.N.Y.1994); *see also* 4 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 17.11[a], [c] (3d ed. 1997) ("Under a valid assignment, the assignee of a claim becomes the real

party in interest for that claim * * * . The assignee is real party in interest even though assignee must account to the assignor.").

Such a valid assignment must be contrasted with a "provision by which one person grants another the power to sue on and collect on a claim [which] confers on the grantee a power of attorney with respect to that claim." *Advanced Magnetics,* 106 F.3d at 17. Such an assignment – for example one that conveys merely "the power to commence and prosecute * * * any suits, actions or proceedings at law or in equity in any court of competent jurisdiction" – does not demonstrate an intent to transfer ownership or title to a claim, and therefore does not entitle the assignee to bring suit in his own name. *Id.* at 14, 18; *see also Titus,* 306 U.S. at 289, 59 S.Ct. 557 ("[A] power of attorney to sue, standing alone, does not * * * operate as an assignment to vest the [assignee] with such title or interest as will enable him to maintain the suit in his own name."); *Airlines Reporting,* 857 F.Supp. at 1046-47 (observing that a "person authorized to bring suit solely on the basis of a power of attorney is not a real party in interest.")

With these principles in mind, the test for determining whether an assignee may bring suit as a real party in interest is whether the assignment transfers legal title to the claim or instead merely transfers a power of attorney. There can be little question that the assignments currently before the Court, which purport to transfer *ownership* of the right to collect, give plaintiffs legal title to the dial-around-compensation claims.

As such, they convey an interest in these claims sufficient to entitle plaintiffs to initiate legal action. Neither the fact that the assignments are for collection purposes nor the fact that plaintiffs are obligated under a separate agreement to remit the proceeds of any legal action to the PSPs negates plaintiffs' present interest in the claims or their right to bring suit. Defendant does not seriously contend otherwise. Instead, while acknowledging the case law described above, defendant argues that plaintiffs have erroneously conflated real party in interest status under Fed. R. Civ. P. 17 with Article III standing, and that even if the holder of a valid assignment may be entitled to bring suit as the real party in interest, "the real issue before the Court is subject matter jurisdiction." (AT & T Opp. at 5.)

Defendant is correct in pointing out that "Rule 17 does not provide an independent basis for jurisdiction" (AT & T Opp. at 5), and that a plaintiff must be both the real party in interest and have standing to bring suit. WRIGHT, *supra* § 1542. This argument, however, is something of a red herring. As the D.C. Circuit has recognized, "[s]tanding and real-party-in interest questions * * * overlap to the extent that both ask whether the plaintiff has a personal interest in the controversy." *Whelan v. Abell,* 953 F.2d 663, 672 (D.C.Cir.1992). Indeed, "[g]enerally real parties in interest have standing," MOORE, *supra* § 17.10[1]. For both statuses require that plaintiffs "possess[ ] a sufficient interest in the action to entitle * * * [them] to be heard on the merits." WRIGHT, *supra* § 1542.

Thus, if a valid assignment transfers an interest sufficient to make the assignee a real party in interest, it logically follows that the assignee will then have the "concrete interest" in the litigation required by the standing doctrine. This is so because what has been assigned in such cases is, in effect, the legal "injury" that generates Article III standing. In other words, the assignment in such cases conveys to the assignee not merely the power to assert a claim on another's behalf, but also the right to vindicate a legal wrong done to the assignor as if that wrong had been done to the assignee itself. Any other conclusion would mean that a real party in interest who has been assigned a claim for collection purposes would never have standing to sue (because the underlying legal injury would have never been done to the assignee itself), which-as we have just seen – is certainly not the law. *See also* MOORE, *supra* § 17.11[1][c] (citing cases in the Second, Ninth, Tenth, and Eleventh Circuits).

And indeed, the cases cited by defendant do not suggest otherwise. Defendant relies on *Whelan* to distinguish between Article III jurisdiction and real party in interest status under Rule 17. (AT&T Opp. at 6-7.) In that case, defendants' challenge to plaintiffs' real party in interest status was barred because defendants did not raise the issue until the first day of trial – thus prejudicing the real party by undue delay. On appeal, defendants attempted to recast their real party in interest challenge into a jurisdictional challenge under Article III, which, unlike Rule

17(a), can be raised at any time.[8] *Whelan,* 953 F.2d at 671. The Court rejected this effort, noting that plaintiffs had clearly suffered an injury and thus had standing to sue. *Id.* at 672. Defendant suggests that since the D.C. Circuit rejected the *Whelan* defendants' effort to recast a Rule 17 challenge into a standing issue, plaintiffs should similarly be precluded here from converting a standing challenge into a Rule 17 issue.

This argument, however, misconstrues both the facts of this case and the holding in *Whelan.* Plaintiffs here are not attempting to recast a standing issue as a Rule 17 issue. They merely highlight the fact, recognized in *Whelan,* that the two standards share a common element. *See id.* (observing that both standards require that "plaintiff has a personal interest in the controversy"). It is true that the D.C. Circuit recognized that a party with standing may not always be the real party in interest (i.e. the party with the right to bring suit under substantive law). For example, where a closely-held corporation is injured, a

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[8] Rule 17(a) provides that "[n]o action shall be dismissed on real-party-in-interest grounds until a reasonable time has been allowed after objection for ratification of commencement of the action by * * * the real party in interest * * * . This implies that the defense may not be raised at any time, for the real party must have the opportunity to step into the 'unreal' party's shoes and should not be prejudiced by undue delay." *Whelan,* 953 F.2d at 672. Thus, the Court held that it was an abuse of discretion to allow a Rule 17(a) defense "as late as the start of the trial if the real party has been prejudiced by the defendant's laxness." *Id.*

shareholder has standing to sue (as an injured party), but that shareholder must also possess the right under governing substantive law to bring suit as the real party in interest; the injury alone is not sufficient. This rule, however, does not imply its converse. And, indeed, as a leading treatise has recognized, although "not every party who meets standing requirements is a real party in interest," real parties in interest generally have standing. MOORE, *supra* § 17.10. The injury that has generated the suit is theirs to vindicate. Nothing in *Whelan* suggests otherwise. Here, the Court has now been persuaded that the assignment has given plaintiffs the requisite interest in the controversy to make them real parties in interest. And nothing has been presented that would tend to cast doubt upon their standing to sue in light of that status.

Defendant fails to cite any cases in which an assignee for collection was found to lack standing. Instead, it relies only on cases that question whether assignments for collection were made collusively in order to create federal diversity jurisdiction in violation of 28 U.S.C. § 1359.[9] (AT&T Opp. at 8-10.) These cases hold that an assignee of title solely for collection purposes may bring suit in federal court based on diversity jurisdiction only if there is complete diversity

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[9] Under section 1359, "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359.

based on the assignor's citizenship. They do not address Article III standing. *E.g., Airlines Reporting Corp. v. S and N Travel,* 58 F.3d 857, 862-64 n. 4 (2d Cir.1995) (holding that though an assignee was the real party in interest under Rule 17(a), the assignments were collusively made for the purpose of manufacturing federal jurisdiction and therefore there was no true diversity of citizenship); *Attorneys Trust v. Videotape Computer Prods.,* 93 F.3d 593 (9th Cir.1996) (assignee of title for collection only may bring suit in federal court where court has diversity jurisdiction based on assignor's citizenship.[10] In the present case, of course, diversity is not in dispute, as the Court's subject-matter jurisdiction is based on the existence of a federal question. As such, the cases relied upon by defendant, which having nothing to say about whether an assignee for collection has standing to sue, are simply inapposite.

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[10] Defendant's reliance on *Compton v. Atwell,* 207 F.2d 139 (D.C.Cir.1953), is equally unconvincing given that the Court there held that the plaintiff, an assignee for collection only, could bring suit for the benefit of other creditors of the defendant. The assignee's standing was not challenged – only his status as a real party in interest. In any event, the Court concluded that it did not need to determine whether the assignee was the real party in interest because plaintiff was authorized to bring suit pursuant to an exception to the real party in interest requirement enumerated in Rule 17(a). *Id.* at 141.

B. Physicians Health

In *APCC I,* this Court relied on a Second Circuit decision which held that where an assignment does not convey a concrete stake in the outcome of the litigation, the assignee/plaintiff (there, the State of Connecticut) does not "suffer an injury of a nature that would confer standing upon it under Article III of the Constitution." *Physicians Health,* 287 F.3d at 115. Invoking this approach, this Court observed:

> Plaintiffs' situation is precisely the same as that of the State of Connecticut. The assignments on which plaintiffs rely for standing do not shift the loss suffered by the PSPs to the aggregators that represent them * * * . And while the Second Circuit recognized that there are some situations where the assignment of a claim may confer standing on an assignee who has not incurred an injury, expense or loss in exchange for the assignment, the Court made clear that such a "'claim' cannot simply refer to a right to bring suit." Since plaintiffs' assignments in this case grant only the right to sue and not a right to a remedy, plaintiffs have failed to establish standing.

APCC I, 254 F.Supp.2d at 139 (citations omitted). The Court now believes that it erred in viewing these two situations as indistinguishable.

In *Physicians Health,* the State of Connecticut brought suit under ERISA against an insurance company that offered managed care plans to Connecticut

residents. The State asserted standing to sue as the assignee of participants in the managed care plans who had been injured by the plans' actions and who had assigned their right to seek injunctive or other equitable relief to the State. However, the plan participants had assigned to the State only "their right to seek 'appropriate equitable relief' with respect to any 'cause of action' they may have as plan participants or beneficiaries." 287 F.3d at 112. As such, the assignments did not reflect an intent to transfer title or ownership of the assignors' claims, but instead merely conferred a power of attorney with respect to that claim, that is, "the right to control the equitable portion of a lawsuit seeking redress of the assignor-participants' rights under ERISA." *Id.* at 118. Because only the right to sue was assigned and the State had no personal interest in the outcome of the suit, the Second Circuit concluded that the assignment did not convey a concrete stake in the litigation, and therefore that the State lacked standing to sue. *Id.* at 118-19.

For purposes of the standing inquiry, however, the Second Circuit contrasted such an assignment with a different type that would generate a different result: "even though an assignee incurs no injury, expense, or loss in exchange for the assignment, a valid and binding assignment of a claim (or a portion thereof) – not only the right or ability to bring suit – may confer standing on the assignee." *Id.* at 117 (emphasis added). Thus, in *Vermont Agency,* the Supreme Court held a relator in a qui tam action

brought under the False Claims Act had constitutional standing notwithstanding the fact that such a party suffers no direct injury from the defendant's alleged wrongdoing. The Court based its conclusion on the "doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." 529 U.S. at 774, 120 S.Ct. 1858. While this doctrine may not always apply (as *Physicians Health* makes clear), it does in the present case.

That is so because the assignments at issue, which provide that each PSP "assigns, transfers and sets over * * * for purposes of collection, all rights, title and interest of the Company in the Company's claims, demands or causes of action for Dial-Around Compensation due the Company," clearly manifest the PSPs' intention to transfer legal title of the claims to plaintiffs. As a result, plaintiffs here actually own the claims at issue (a power the State of Connecticut lacked), and therefore are entitled to bring this suit in their own name. *See* 287 F.3d at 118-19 (emphasizing the fact that the assignments merely gave the State "the right to act as a nominal party"). Moreover, as described above, this transfer of ownership also transfers the legal injury that is the basis for the Article III standing.[11] In this sense, it is significant that the assignments in *Physicians Health* did not

[11] Or, to put the same concept in different terms, the assignment may be said to confer on the assignee a kind of "representational standing." *Vermont Agency,* 529 U.S. at 774, 120 S.Ct. 1858.

provide for a remedy on which the State itself could collect, but were solely for injunctive relief, which could have benefitted only the punitive assignors and not the nominal plaintiff. Such an assignment left the underlying injury with the plan beneficiaries, and meant that a favorable judicial ruling would not have alleviated any harm suffered by the State, or redounded to its direct benefit. Accordingly, the State did not "stand[] in the assignor's stead with respect to both injury and remedy," and thus was without standing to sue. *Id.* at 117.

Here, in contrast, the assignments allow plaintiffs to seek a remedy (money damages) that, if awarded, would run to plaintiffs directly and satisfy their claims – even though they are ultimately obligated to remit any damages awarded to the PSPs. Accordingly, by virtue of the assignments, plaintiffs have come to stand in the place of the PSPs with respect to both injury and remedy. Unlike the State of Connecticut, they are the legal owners of the claims they assert and have the exclusive right to collect on those claims; they thus have a concrete stake in the outcome of the litigation sufficient to satisfy the injury-in-fact requirements of Article III. And, a decision ordering defendant to compensate plaintiffs would redress this injury. Under the framework set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), plaintiffs therefore have standing to bring this suit.

III. Assignability of Claims under Applicable Law

In their initial motion to dismiss, defendant argued that even if plaintiffs have standing, the claims made by plaintiff APCC Services on behalf of its assignors must be dismissed because those claims are not assignable under Virginia law. As the Court has determined that plaintiffs have standing to sue, it must now address this issue.

Defendant argues that the claims asserted by plaintiffs are not assignable under Virginia law, which limits the types of claims that may be assigned to "causes of action for damage to real or personal property." Va. Code Ann. § 8.01-26 (West 2003). It is, however, irrelevant whether this state statute would actually bar the assignment of the claims asserted. Defendant's argument fails because plaintiffs' claims are based on violations of federal law, and it is well settled that "[w]here a claim for relief is created by federal statute, federal law governs the assignability of the claim." *In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Lit.*, 636 F.Supp. 1138, 1152 (C.D.Cal.1986) (assignability of RICO treble claim is one of federal law); *see also Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 85 F.3d 970, 973 (2d Cir.1996) ("The federal courts have consistently determined that federal law governs the assignability of claims under the federal securities laws."); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 437 (3d Cir.1993)

(Greenberg, J., concurring) ("the validity of the assignment of an antitrust claim is a matter of federal common law").

CONCLUSION

For the reasons discussed above, the Court concludes that plaintiffs have standing to bring this suit based on the assignments from the PSPs and that these assignments are legally permissible. The Court therefore grants plaintiffs' motion for reconsideration, and vacates its March 28, 2003 Memorandum Opinion and Order. Given these rulings, the remaining motions to amend have been rendered moot. A separate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the Court on plaintiffs' motions for reconsideration and for leave to amend its complaint and plaintiff Peoples Telephone Company's motion for leave to amend. Based on the pleadings, the record, and relevant case law, it is hereby

ORDERED that plaintiffs Motion for Reconsideration is **GRANTED**; it is

FURTHER ORDERED that the Court's March 28, 2003 Memorandum Opinion in *APCC Servs. v. AT & T*, 254 F.Supp.2d 135 (D.D.C. 2003), and corresponding Order are **VACATED**; it is

FURTHER ORDERED that AT & T's Motion to Dismiss Assignee Plaintiffs' Claims is **DENIED**; it is

FURTHER ORDERED that the Aggregators' Motion for Leave to Amend is **DENIED AS MOOT**; it is

FURTHER ORDERED that Peoples Telephone Company's Motion for Leave to Amend is **DENIED AS MOOT**; and it is

FURTHER ORDERED that Defendant AT & T's Motion to Seal [78-1] is **GRANTED**.

SO ORDERED.

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	
v.	*	No. CIV.A. 01-642 ESH
SPRINT COMM'N CO., L.P.	*	Sept. 3, 2003.
Defendant.	*	

ORDER

This matter is before the Court on plaintiffs' motion for leave to amend and defendant's cross-motion to dismiss for lack of subject matter jurisdiction. This case is substantially identical to those presented in *APCC Services, Inc. v. AT&T*, Civ No. 99-696, and the issues raised by the parties are addressed in the Court's Memorandum Opinion and Order in the *AT&T* case issued on this date. Based on the pleadings, the record, and relevant case law, and for the reasons discussed in the Court's concurrently-issued opinion in the *AT&T* case, it is hereby

ORDERED that plaintiffs' Motion for Leave to Amend is **GRANTED IN PART** with respect to additional grounds for relief and **DENIED AS MOOT** with respect to joinder of plaintiffs; and it is

FURTHER ORDERED that defendant's Cross-Motion to Dismiss for Lack of Subject Matter Jurisdiction is **DENIED**.

SO ORDERED.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7034 **September Term, 2006**

01cv00642
99cv00696

(Filed On: Aug. 7, 2007)

APCC Services, Inc., as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit A, et al.,

Appellees

v.

Sprint Communications Co.,

Appellant

Consolidated with 04-7035

BEFORE: Ginsburg, Chief Judge, and Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed June 8, 2007, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7034 **September Term, 2006**

01cv00642
99cv00696

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APCC Services, Inc., as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit A, et al.,

Appellees

v.

Sprint Communications Co.,

Appellant

Consolidated with 04-7035

BEFORE: Ginsburg, Chief Judge, and Sentelle Henderson* Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

---

* Circuit Judge Henderson did not participate in this matter.

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

ORAL ARGUMENT SCHEDULED
OCTOBER 21, 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 04-7034
(and consolidated with Case No. 04-7035)

APCC SERVICES, INC., *et al.*,

Appellees,

- v. -

SPRINT COMMUNICATIONS COMPANY L.P., *et al.*,

Appellants.

On Appeal From
The United States District Court
For The District Of Columbia
Case Nos. 01CV00642 and 99CV00696

JOINT APPENDIX
VOLUME I

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Attorneys for Appellant AT&T Corporation

* * *

ASSIGNMENT AND POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that Coyote Call, Inc., a Kansas [corporation/partnership/proprietorship], hereinafter referred to as the "Company", hereby assigns, transfers and sets over to APCC Services, Inc. ("APCCS") (or APCCS' assignee) for purposes of collection all rights, title and interest of the Company in the Company's claims, demands or causes of action for "Dial-Around Compensation" ("DAC") due the Company for periods since October 1, 1997, pursuant to Federal Communications Commission rules, regulations and orders. Further, the Company hereby appoints APPCS as its true and lawful attorney-in-fact for the purpose of exercising the following powers:

1. To do all acts necessary for the purpose of collecting DAC due the Company for periods since October 1, 1997.

2. To enter into any discussions or other activities on behalf of the Company in connection with attempting to resolve such DAC claims, including, without limitation, selecting and retaining legal counsel, and filing and prosecuting court or regulatory proceedings in the Company's interest. The Company agrees to be bound by final determinations in court or regulatory proceedings prosecuted by APCCS in the Company's interest.

3. To sign, on behalf of the Company, settlement agreements, releases, or other documents relating to the settlement of DAC claims. Company hereby agrees to be bound by any settlement, compromise or release reached by APCCS on its behalf and that any document executed in connection with any such settlement, compromise or release by APCCS on behalf of the Company shall be binding on the company.

4. Company specifically acknowledges and confirms that no person or entity who shall pay to APCCS (or its assignee) amounts relating in any way to DAC owed to the Company shall be liable to Company to the extent of any amounts so paid, unless the person or entity making such payment has actual knowledge that the authority granted to APCCS by this Assignment and Power of Attorney has been properly revoked. This Assignment and Power of Attorney (which is coupled with an interest) may not be revoked without the written consent of the attorney-in-fact.

IN WITNESS WHEREOF, Company has caused this Assignment and Power of Attorney to be executed and delivered by a duly authorized officer of the Company, to be effective this 11 day of February, 1999.

/s/ Coyote Call, Inc.
Company

ATTEST:

By: /s/ Vicki H. Lindgren
Its: Vice-President

By: /s/ David Lindgren
Its: President

AMENDMENT TO
APCC SERVICES AGENCY
COMPENSATION AGREEMENT

PSP: _____ Federal Tax ID: _____

Address: _____ Authorized Contact: _____

_____

Telephone: _____ Fax: _____

WHEREAS, APCC Services, Inc. ("APCCS") and PSP have entered into an APCC Services Agency Compensation Agreement ("Agreement"), under which APCCS is PSP's exclusive agent for billing and collection of "Dial-Around Compensation" ("DAC"); and

WHEREAS, there are DAC payments owed by telecommunications carriers as a result of the miscounting and undercounting of calls or simply a

failure or refusal to pay, which APCCS has not been able to resolve by routine dispute resolution processing and PSP wishes APCCS to take further action to collect the unpaid DAC (hereinafter referred to as "DAC Claims"); and

WHEREAS, APCCS wishes to act as PSP's exclusive agent for resolving DAC Claims and the parties recognize the efficiencies of APCCS taking collective action on behalf of PSP and other independent payphone service providers with similar claims; and

WHEREAS, in order to take quick, effective, and efficient collection action, APCCS will be required to exercise broad reasonable discretion in making collective decisions on behalf of PSP and other payphone service providers.

NOW, THEREFORE, be it agreed that the Agreement is amended as follows:

1. All capitalized terms and abbreviations not defined in this Amendment shall have the meanings set forth in the Agreement.

2. PSP appoints APCCS as its exclusive agent for collection of PSP's DAC Claims which relate to periods since October 1, 1997 and which have not been paid.

3. APCCS will take such action as it deems reasonably necessary and appropriate to collect payment of PSP's DAC Claims, which may include collective legal action such as filing complaints at the

FCC or in court on behalf of PSP and other payphone service providers.

4. APCCS is authorized to take any reasonable step on PSP's behalf to collect payment for the DAC Claims, including, without limitation, selecting and retaining legal counsel, filing and prosecuting legal complaints in PSP's name against any or all carriers withholding payments and/or other parties, and entering settlements of some or all DAC Claims with one or more parties, without obtaining further oral or written authorization from PSP. PSP will accept APCCS's reasonable determinations as to what actions are necessary and appropriate to cost-effectively collect payment of the DAC Claims.

5. APCCS will provide general information to PSP from time to time as to the progress of APCCS's overall collection effort for DAC Claims. However, APCCS is not required to inform PSP in advance of any particular measure taken on PSP's behalf or to provide information on legal strategy.

6. PSP will promptly provide APCCS with all documentation that APCCS or its counsel reasonably believes to be necessary in order to pursue collection of PSP's DAC Claims.

7. APCCS is authorized, in the reasonable exercise of its discretion, to agree to a settlement of some or all of PSP's DAC Claims, which may include one or more lump sum settlements that will be apportioned among PSP and other payphone service providers on whose behalf APCCS enters into such

settlements. PSP understands that such settlements may preclude any further claim by PSP for the amounts in dispute.

8. For the additional services to be provided by APCCS over and above the services provided pursuant to the Agreement, PSP agrees to and specifically authorizes APCCS to make a deduction from PSP's DAC payments in an amount necessary to fund PSP's share of the activities described above to collect DAC Claims on behalf of PSP. The initial amount of the deduction will be:

> $.007 on the first 50,000 dial around calls paid in the quarterly remittance, plus
> $.006 on the next 900,000 dial around calls paid in the quarterly remittance, plus
> $.005 on the next 550,000 dial around calls paid in the quarterly remittance, plus
> $.004 on the next 1,000,000 dial around calls paid in the quarterly remittance, plus $.003 on any remaining calls.

Quarterly deductions will be capped at $20,000, except in the case of subsequent business combinations for which special conditions may apply requiring additional contributions in excess of the stated cap.

PSP understands that funding requirements will be reevaluated quarterly and agrees that the above level of deduction may be increased or decreased as necessary to provide funding adequate to carry out the above-described activities. In the event that PSP

chooses not to meet the funding requirements or PSP terminates the Agreement, APCCS will be relieved of any further obligation to represent PSP in the collection of PSP's DAC Claims and APCCS will have no obligation to remit to PSP any amounts previously deducted from PSP's DAC payments.

APCCS agrees that if it recovers attorneys fees and/or costs in connection with any lawsuit APCCS may bring to collect PSP's DAC Claims, it will remit such recoveries to PSP in amounts reflecting PSP's proportionate share of the funding for such lawsuit provided by all payphone service providers.

9. Except as amended, the Agreement remains in effect. This Amendment is subject to the "Terms and Conditions" attached to the Agreement, each of which is incorporated herein by reference, except to the extent that such "Terms and Conditions" are amended herein. If the Agreement is not renewed, this Amendment remains in effect.

IN WITNESS WHEREOF, and of the "Terms and Conditions" hereof, the undersigned have entered into this Amendment to the APCC Services Compensation Agreement effective this ___ day of ___, 1999.

PSP

Company Name: _____

By: _____

Title: _____

APCC Services, Inc.: _____

By: _____

Title: _____

The Assignment and Power of Attorney and the Dial Around Compensation Billing Data Sheet attached to this Amendment must be signed and returned with this Amendment. Please return executed documents to:

APCC Services, Inc.
10306 Eaton Place
Suite 520
Fairfax, VA 22030
(703) 385-5301 – fax

* * *

DIAL AROUND COMPENSATION
BILLING DATA SHEET

PSP Company Name: _____

Address: _____

_____

Authorized Contact: _____

Federal Tax ID: _____

Please indicate the number of phones for which you billed and which aggregator you used to bill and collect your dial around compensation or whether you did it yourself for the time periods in question.

	4Q97	**1Q98**	**2Q98**	**3Q98**
Approximate # of phones	_____	_____	_____	_____
Did it Myself	_____	_____	_____	_____
APCC Services	_____	_____	_____	_____

DataNet Systems	____	____	____	____
IPANY	____	____	____	____
Pacific Telemanagement	____	____	____	____
NSC Telemanagement	____	____	____	____
Other: _____	____	____	____	____

Thank you!

APCC
SERVICES

To: All APCC Services' Customers
From: Vincent R Sandusky, President
Date: February 5, 1999
Subject: **APCC Services Dial Around Litigation**

Attached are the documents that you ***must execute and return*** if you wish to be a part of APCC Services' (APCCS) litigation efforts to collect unpaid dial around compensation since 4Q97.

These documents include:

1. Amendment to APCC Services Agency Compensation Agreement
2. Assignment and Power of Attorney
3. Billing Data Sheet

You must execute and return these documents immediately to assure inclusion in the suits to collect unpaid dial around compensation.

More detailed information on this effort to collect unpaid dial around payments follows.

On behalf of its clients who wish to participate and help finance the litigation, APCCS is moving forward to collect unpaid dial around compensation. APCCS will be joined in this effort by certain other aggregators and PSPs.

Underpayment and/or non-payment of dial around compensation are clearly the greatest threats to the financial viability of many PSPs. Based upon the lack of cooperation by many obligated carriers, litigation appears to be the best and quickest way to resolve the outstanding issues.

It is our intention to file suits ***immediately*** on behalf of those customers providing authorization. Initially, those suits target AT&T for underpayment and a group of carriers which have made no payments at all.

Please read and execute the enclosed documents in order to join in this important litigation to collect unpaid dial around. We want to move forward as quickly as possible to compel carrier compliance with payphone compensation obligations. Most importantly, a show of strength through litigation will serve to immediately encourage increased payment levels and future compliance. Just the threat of this litigation has already generated positive response from certain carriers. Others need to get the message that we are serious.

The effort is expected to be massive, complicated and costly. However, enforcement of payment requirements should yield considerable benefits for PSPs.

Based upon current payment experiences, it appears non-LEC PSPs are being underpaid by over $80 million annually. *Collection on past payments is important, but correcting the situation going forward is critical.* The legal team has provided us with estimates of between $2 million and $2.5 million annually to prosecute these suits if carriers put up a vigorous defense. We expect the first ones will do so. However, if we are successful, a $2.5 million investment to collect unpaid dial around since October of 1997 and to improve future collections by up to $80 million annually makes good sense. *As we cover later in this memo, the most we expect anyone to kick in to help fund this important effort is just seven-tenths of a penny per dial around call.* Further too, we may be entitled to a substantial portion of our attorney's fees and expenses to be paid back by defendants, assuming we are successful with our claims.

At the legal team's suggestion, a management committee representing the initial named plaintiffs will oversee the suits. The management committee will work with the legal team to identify defendants, agree on legal strategy, set budgets and funding requirements and, when appropriate, settle suits.

With regard to potential settlements, the management committee has agreed that to the extent possible, each plaintiff will receive dial around compensation settlements on a per call basis based upon that company's actual traffic associated with its payphones. In other words, we will try to avoid settlements that return a flat rate per phone as that

does not provide fair return to those with higher traffic locations. Further, should legal fees and expenses also be awarded, they will be returned to the individual plaintiffs in the same proportion as their individual contribution to the suit.

In addition to being a major part of the management committee, APCC Services will provide substantial administrative support and data collection services and will serve as an information clearinghouse providing formal updates for participating customers – all at no extra charge or expense to participants, Additionally, APCC Services is providing $100,000 seed money to launch this effort.

The legal team is composed of the most experienced and successful attorneys and litigators in the industry. Each of the members of this multi-firm effort have successfully represented payphone providers and payphone associations in numerous battles at the state and federal levels against LECs and major IXCs. We know we have assembled the best qualified legal and regulatory minds that can guide us through this complicated process.

As mentioned above, the legal team has given us a "worst case" budget of approximately $2.5 million annually to pursue these suits, assuming carriers vigorously defend against them. To fund the suits, all plaintiffs are being required to agree to a quarterly assessment of their dial around compensation on a per call basis. *The most we anticipate having to ask plaintiffs to contribute is just seven-tenths of a penny*

per call. As indicated in the enclosed amendment to the APCC Services Agency Compensation Agreement, the initial quarterly contribution will be:

$.007 on each of the first 50,000 calls,
$.006 on each of the next 900,000 calls,
$.005 on each of the next 550,000 calls,
$.004 on each of the next 1,000,000 calls, and
$.003 on each call above 2,500,000 calls.

The management committee will evaluate cash needs quarterly to determine whether these rates will need to be adjusted up or down. Remember, should we recover attorney's fees and/or costs during the litigation, such recovery will be returned to plaintiffs proportionate to their contributions.

If a PSP refuses to permit the above deductions or withdraws his/her agreement to allow these deductions prior to conclusion of the suits, APCCS will drop that PSP from the plaintiff's list and will have no obligation to represent the PSP in the collection of these claims nor will APCCS remit any recovery of legal fees or expenses. *Let me repeat this in something other than legalese – you have to agree to contribute to get any benefit from the suits. If you don't agree to contribute, you will not be named as a plaintiff. If you do agree, but later withdraw that agreement, you get nothing – no back dial around collected by this litigation or any return of your funding contributions.* **You've got to pay to play and once you're in, you've got to stay in to reap the benefits.**

I also want to point out that the enclosed Assignment and Power of Attorney which you must sign and return, assigns your DAC claims since October 1, 1997 to APCCS "for purposes of collection." This will allow APCCS to prosecute the litigation on your behalf. If at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose.

If you have specific questions about the goals of the suits or want additional clarification about anything in this memo, please contact me or Greg Haledjian at APCC Services.

I look forward to adding you to the list of plaintiff PSPs willing to support these efforts to enforce carrier payment obligations.

OPPOSITION BRIEF

(2)

No. 07-552

FILED
DEC 7 - 2007
SUPREME COURT, U.S.

In the Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P. & AT&T CORP.,

Petitioners

v.

APCC SERVICES, INC., *et al.*,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, defendants and appellants below, are Sprint Communications Company L.P. and AT&T Corp.

Respondents, plaintiffs and appellees below, are APCC Services, Inc.; Data Net Systems, L.L.C.; Davel Communications Group, Inc.; Jaroth, Inc. d/b/a Pacific Telemanagement Service; NSC Telemanagement Corp., n/k/a Intera Communications Corporation; and Peoples Telephone Co., Inc.

APCC Services, Inc., a Virginia corporation, is a for-profit subsidiary of the American Public Communications Council, Inc., a District of Columbia not-for-profit corporation that is not publicly traded.

Data Net Systems, L.L.C., is an Illinois Limited Liability Company that is not affiliated with any publicly traded company.

Davel Communications Group, Inc. is an Illinois corporation whose parent corporation, Davel Communications, Inc., is a wholly owned subsidiary of MobilPro Corp., which is a publicly traded corporation. No publicly traded corporation holds a 10 percent or greater ownership in MobilPro Corp.

Jaroth, Inc. d/b/a Pacific Telemanagement Services is a California corporation that is not affiliated with any publicly traded company.

NSC Telemanagement Corporation n/k/a Intera Communications Corporation is a Delaware corporation that is not affiliated with any publicly traded company.

Peoples Telephone Company, Inc. is a New York corporation whose parent corporation, Davel Communications, Inc., is a wholly owned subsidiary of MobilPro Corp., which is a publicly traded corporation. No publicly traded corporation holds a 10 percent or greater ownership in MobilPro Corp.

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT

In 1999, respondents sued petitioner AT&T for failure to pay payphone service providers (PSPs) amounts they were owed under FCC rules. After years of litigation, AT&T moved to dismiss the lawsuit on the ground that some plaintiffs lacked standing. The district court observed that "defendant failed to raise this jurisdictional defect during the four years that this case has been pending." *APCC Services, Inc.* v. *AT&T Corp.*, 254 F. Supp. 2d 135, 136-137 (D.D.C. 2003). The district court nevertheless granted the motion. *Id.* at 144. On reconsideration, however, the district court concluded that all respondents have standing. Pet. App. 83-106. The court relied on "a long line of cases and legal treatises that recognize a well-established principle that assignees for collection purposes are entitled to bring suit where the assignments transfer absolute title to the claims." *Id.* at 90. The respondents who are not themselves PSPs hold such assignments.[1]

Each of the approximately 1400 identical assignments gives respondents the authority to pursue this litigation as they see fit. But see Pet. 3 (asserting, with no citation to any opinion below, that "[t]he aggregators are not allowed to pursue the case as they see fit and in

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[1] Three of the six respondents have ownership interests in PSPs and therefore have standing without regard to whether assignees have standing. Pet. App. 10 n.**. Petitioners nevertheless assert without explanation that they challenge the standing of two of those three respondents. Pet. 5 n.1. Because all respondents have standing, the point is academic.

their own interests"). In particular, the assignments give respondents authority to sign

> settlement agreements, releases, or other documents relating to the settlement of [dial-around compensation] claims. [PSP] hereby agrees to be bound by any settlement, compromise or release reached by [aggregator] on its behalf and that any document executed in connection with any such settlement, compromise or release by [aggregator] on behalf of the [PSP] shall be binding on the [PSP].

C.A. App. 135. As the D.C. Circuit put it, petitioners "give us no reason to believe the assignment is anything less than a complete transfer to [respondents] of the PSP's dial-around compensation claim." Pet. App. 12; see also *ibid.* ("the assignment itself is plain: the PSP may not revoke it without the consent of the aggregator").[2]

On December 17, 2003, the district court certified for interlocutory appeal the question whether the non-PSP respondents have standing and the separate question – raised by petitioner Sprint in a lawsuit that was later consolidated for purposes of appeal – whether there is a private cause of action to enforce the FCC regulations. Pet. App. 45-63. The court observed that, "although plaintiffs argue correctly that they will be prejudiced by further delays, in the event that it is ulti-

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[2] Two judges – District Judge Huvelle, before reversing herself, and Circuit Judge Sentelle, dissenting in part – wrote opinions agreeing with petitioners that assignees-for-collection lack standing. *APCC Services, Inc.* v. *AT&T Corp.*, 254 F. Supp. 2d 135 (D.D.C. 2003) (omitted from petition appendix); Pet. App. 28-35. Neither judge agreed with petitioners' contention that respondents have anything less than complete control of the litigation.

mately found that this Court lacks jurisdiction to litigate these cases, it would be far better for all concerned * * * to have these matters resolved now, as opposed to sometime in the distant future." *Id.* at 61. The district court could not have imagined that the issues it certified for interlocutory appeal would still be pending in the appellate courts four years later.

On interlocutory appeal, the D.C. Circuit held that petitioners have standing but that there is no private cause of action to enforce the FCC regulations. Pet. App. 4-41. Judge Sentelle dissented with respect to standing. Chief Judge Ginsburg dissented with respect to a private cause of action based on 47 U.S.C. § 201(b).

In upholding the standing of respondent assignees, the majority observed that "[t]he assignments at issue here * * * transfer to the assignees the entire interest of the PSPs in their dial-around compensation claims." Pet. App. 14. The court noted that the main case on which petitioners relied to attack respondents' standing, *Connecticut* v. *Physicians Health Services*, 287 F.3d 110 (2d Cir. 2002), "is not helpful; it did not address the question whether an assignee that would otherwise have standing to sue loses its standing when it obligates itself to give the proceeds of the suit to another." Pet. App. 14. But "[c]ourts and commentators" – including the very same court that decided petitioners' flagship case – "agree that, if an assignment properly transfers ownership of a claim, then the assignee's interest 'is not affected by the parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought on the claim.'" Pet. App. 15 (quoting *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997)).

The majority acknowledged that some of the authorities on which it relied addressed the question of who is the "real party in interest" for purposes of FED. R. CIV. P. 17(a). It also acknowledged that the proposition that standing and real-party-in-interest inquiries sometimes diverge is "true enough, as far as it goes." Pet. App. 15. "But standing also depends in part, as does a plaintiff's status as the real party in interest, upon having 'a personal interest in the controversy.'" *Ibid.* (quoting *Whelan* v. *Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992)). The Rule 17 cases indisputably establish that respondents have a personal interest in the controversy as a result of the assignments.[3] And the D.C. Circuit saw "no basis for distinguishing the personal stake required under Rule 17(a) from the interest required for standing." Pet. App. 16.

After this Court decided *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513 (2007), it was clear that Chief Judge Ginsburg's dissent had been correct and that the D.C. Circuit majority had been wrong to conclude that no private right of action existed. Following a remand from this Court, 127 S. Ct. 2094 (2007), the D.C. Circuit therefore affirmed the district court in its entirety. Pet. App. 1-3. Petitioners sought rehearing and rehearing en

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[3] Thus, the premise of petitioners' question presented – "[w]hether the assignment of a claim 'for purposes of collection' confers standing on assignees *which have no personal stake in the case* and which avowedly litigate only 'on behalf of the assignors'" (Pet. i (emphasis added)) – requires this Court to *assume* that the D.C. Circuit was wrong in concluding that respondents *do* have a personal interest in the controversy. The real question presented by the petition is not the one petitioners frame, but whether assignees-for-collection litigating on behalf of assignors *have* the requisite personal interest, which the D.C. Circuit held they do.

banc, arguing that somehow their position with respect to a private right of action had prevailed in *Global Crossing*, and that respondents lack standing. The court did not call for a response, and no judge of the D.C. Circuit – including Judge Sentelle, who had dissented on standing – called for a vote on rehearing en banc. Pet. App. 109-112.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Moreover, the petition raises an issue of no general importance. Further review is not warranted. And further review would be especially inappropriate to prolong what has already been an eight-year delay in resolving the preliminary issue of standing, an issue that has received appellate attention only because the district judge four years ago certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b) in the hope that appellate resolution would materially advance the litigation.

1. This Court, speaking through Justice Scalia and without dissent on the relevant proposition, recently reaffirmed "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). In an assignment situation, this Court squarely held, the *assignor's* injury in fact is what matters. *Id.* at 774 ("*the United States'* injury in fact suffices to confer standing on respondent Stevens") (emphasis added). Attempting to draw a razor-thin distinction, petitioners argue that there is an exception to that doctrine – that the assignee *does not* have standing to assert the

assignor's injury in fact – when the assignee must return to the assignor the proceeds collected through litigation. See also Pet. App. 29 (Sentelle, J., dissenting) ("There are 'assignments,' and then there are assignments."). But no federal appellate court has accepted the argument petitioners make.

This Court said just the opposite 68 years ago: an assignment's "legal effect was not curtailed by the recital that the assignment was for purposes of suit and that its proceeds were to be turned over or accounted for to another." *Titus* v. *Wallick*, 306 U.S. 282, 289 (1939). Even earlier, this Court upheld the right of an assignee-for-collection to sue before a federal agency and in federal court:

> The assignments were absolute in form, and plainly their effect * * * was to vest the legal title in Spiller. What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award of reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments.

Spiller v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117, 134 (1920).

The rule of *Titus* and *Spiller* was not explicitly couched in Article III terms, although federal courts of course have an obligation to assess their own jurisdiction.[1] But the decisions in those cases gave rise to the

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[1] Although *Titus* originated in state court, the assignee invoked the jurisdiction of this Court to obtain a reversal of the judgment of the Supreme Court of Ohio. Thus, this Court was required to deter-

widespread conclusion that an assignee-for-collection *may* bring a lawsuit in federal court, regardless of any obligation to return collected proceeds to the assignor, as long as the assignee has been assigned legal title to the claim.

The rule has been stated consistently in hornbooks[5] and cases.[6] If petitioners are correct, however,

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mine that the assignee had Article III standing. See ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE § 18.1(b), at 814 (8th ed. 2002) ("[A] party who seeks entry into the federal court system for the first time must be able to satisfy the Article III standing requirements at that point. That is true even if the initial entry occurs at the Supreme Court level, as when a party seeks to invoke the Court's certiorari jurisdiction to review a state court judgment.").

[5] *E.g.*, 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARK KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1545 (2d ed. 1990) ("[F]ederal courts have held that an assignee for purposes of collection who holds legal title to the debt * * * is the real party in interest even though the assignee must account to the assignor for whatever is recovered in the action."); 6 Am. Jur. 2d *Assignments* § 184 ("An assignee for collection or security only is within the meaning of the real party in interest statutes and entitled to sue in his or her own name on an assigned account or chose in action, although he or she must account to the assignor for the proceeds of the action, even when the assignment is without consideration.") (footnotes omitted).

[6] *E.g.*, *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997) (the ability of a plaintiff assigned ownership of the claim to bring suit "is not affected by the parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought on the claim"); *Klamath-Lake Pharmaceutical Ass'n* v. *Klamath Medical Serv. Bureau*, 701 F.2d 1276, 1282 (9th Cir. 1983) (association assigned pharmacies' antitrust claims could sue even though the pharmacies "retained their interest in the outcome of the litigation"); *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196,

every litigant to contest the ability of an assignee-for-collection to bring suit, every court to address that question, and every treatise writer has simply overlooked an Article III defect and focused on the wrong legal question.

2. Petitioners' radical theory is incorrect for the reasons the D.C. Circuit majority gave (Pet. App. 14-16) – but, even if there were something to petitioners' radical theory, there would be time enough for this Court to address it after more than one litigant had raised it in more than one lower court. At present, *not one case* other than the decision below explicitly addresses a "standing" attack on the ability of an assignee-for-collection, which has been given legal title to the claim, to bring suit.

The cases that petitioners claim are in conflict with the decision below all address different questions. This Court's cases – on which petitioners rely for undisputed propositions such as the proposition that the plaintiff must have a personal interest in the lawsuit, see note 3, *supra* – do not address assignees-for-collection.[7] Those cases do not purport to disavow, for

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1207-1208 (9th Cir. 1975) ("[w]hile an association may not sue on its own to assert the rights of its members under the antitrust laws, it may sue as assignee of the legal rights of others"); *Gulfstream III Associates, Inc.* v. *Gulfstream Aerospace Corp.*, 995 F.2d 425, 437 (3d Cir. 1993) (Greenberg, J., concurring) ("it is commonplace for individual persons claiming antitrust injury to assign their claims to an association formed for the specific purpose of pursuing litigation").

[7] Petitioners claim that in *Vermont Agency* this Court "held that two elements of the relator's status were jointly critical to the existence of Article III standing." Pet. 19-20. This Court held no such thing. One can search the opinion of the Court in vain for *any* indication by this Court – let alone a holding – that those two

standing purposes, this Court's long-ago observation that ownership of beneficial (as opposed to legal) title to a claim is "not necessary to support the right of the assignee to claim an award of reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims." *Spiller* v. *ATSF*, 253 U.S. at 134.[8]

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elements were jointly critical to Article III standing. The Court held that the relator's "bounty" did *not* suffice to confer Article III standing, 529 U.S. at 772, and held that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor," *id.* at 773. Nowhere did the Court hint that there was any synergistic effect between the factor it deemed insufficient to confer standing and the factor – that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim," *ibid.* – that the Court deemed sufficient to confer standing.

[8] Chief Judge Ginsburg and Judge Randolph are particularly odd jurists to accuse of having lost sight of "[b]asic [t]enets of [t]his Court's [s]tanding [j]urisprudence" to favor payphone plaintiffs. Pet. 11. Each of those two judges has vigilantly enforced standing limitations announced by this Court. See, *e.g.*, *Florida Audubon Society* v. *Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) (en banc) (standing denied in opinion by Judge Sentelle, joined by Judge Ginsburg, Judge Randolph, and others, over multiple dissenting votes); *J. Roderick MacArthur Foundation* v. *FBI*, 102 F.3d 600 (D.C. Cir. 1996) (standing denied for failure to show injury in fact, in opinion by Judge Ginsburg for partially divided panel); *Skaggs* v. *Carle*, 110 F.3d 831 (D.C. Cir. 1997) (standing denied for failure to show injury in fact, in opinion by Judge Ginsburg for divided panel); *Gottlieb* v. *FEC*, 143 F.3d 618 (D.C. Cir. 1998) (standing denied in opinion by Judge Randolph for failure to allege injury); *Franklin* v. *District of Columbia*, 163 F.3d 625, 633 (D.C. Cir. 1998) (standing denied in opinion by Judge Randolph for failure to establish actual injury at trial). And, as the panel's first opinion in this case shows by ordering dismissal based on a conclusion later rejected by seven Justices of this Court in *Global Crossing*, those judges have not been overly hospitable to payphone plaintiffs in general.

As for the decisions of lower courts (all of which arose in the ERISA context), none involved an assignee-for-collection with legal title, and the very same courts have made clear that they will allow such assignees to bring suit. Petitioners rely principally on *Connecticut* v. *Physicians Health Services*, 287 F.3d 110 (2d Cir. 2002), which both courts below correctly distinguished. Pet. App. 13-14, 100-103. The assignors in that case purported to give the State their right to "any cause of action" for "appropriate equitable relief." 287 F.3d at 112. They retained, however, their right to seek monetary relief. *Id.* at 115 n.6.

The Second Circuit recognized that there are situations "where, even though an assignee incurs no injury, expense, or loss in exchange for the assignment, a valid and binding assignment of a *claim* (or a portion thereof) – not only the right or ability to bring suit – may confer standing on the assignee." 287 F.3d at 117 (emphasis in original). The court was reiterating the distinction it enunciated in *Advanced Magnetics*, 106 F.3d at 17-18, between the standing of a plaintiff assigned complete ownership of the *claim* (as in this case) and the lack of standing of a plaintiff merely granted a power of attorney to bring suit (as in *Physicians Health*). The standing of a plaintiff assigned ownership of the claim "is not affected by the parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought on the claim." *Advanced Magnetics*, 106 F.3d at 17. But the State was not within that rule, and lacked standing, because the assignments "divorce the equitable cause of action aimed at an alleged breach of fiduciary duty from the duty itself" and because "the assignments do not shift the loss suffered by individual enrollees from the alleged breach of such duty from the individuals to the

State." 287 F.3d at 116. The Second Circuit, thus, expressly distinguished cases like the present case – in which legal title to a claim has been assigned – from cases in which there is a purported assignment of only a right to sue.

Petitioners also rely (Pet. 29, 31) on *Connecticut* v. *Health Net, Inc.*, 383 F.3d 1258 (11th Cir. 2004). The Eleventh Circuit observed that the assignments in that case were "virtually identical to those at issue in [*Physicians Health*]" in that the "right to recover benefits or to seek money damages remains with the assignors." *Id.* at 1261. The Eleventh Circuit held that Connecticut lacked standing for "the reasons set out in Part II of [*Physicians Health*], 287 F.3d at 115-19." *Ibid.* Therefore, the Second Circuit's analysis and reasoning, distinguishing assignments of legal title for collection (like those in the present case) from assignment of only a right to sue, apply with equal force to *Health Net*. This case presents no conflict with the Eleventh Circuit.

Glanton ex rel. Alcoa Prescription Drug Plan v. *AdvancePCS Inc.*, 465 F.3d 1123 (9th Cir. 2006), cert. denied, 128 S. Ct. 126 (2007), did not involve an assignment at all. Rather, the plaintiffs – two unharmed individuals who sought to bring suit as *representatives* of an ERISA plan, 465 F.3d at 1125 – sought to *analogize* their situation to that of a *qui tam* plaintiff, who has standing under the *Vermont Agency* case. The Ninth Circuit "f[ou]nd the qui tam analogy inapt. Whereas qui tam actions have existed for centuries, there is no similar tradition of unharmed ERISA beneficiaries bringing suit on behalf of their plans." 465 F.3d at 1125.

Indeed, the Ninth Circuit followed the lead of the Second, Third, and Eighth Circuits in rejecting unharmed ERISA plan beneficiaries' standing to sue as

representatives of ERISA plans. See 465 F.3d at 1125 (citing *Central States Southeast & Southwest Areas Health & Welfare Fund* v. *Merck-Medco Managed Care*, 433 F.3d 181, 201 (2d Cir. 2005); *Horvath* v. *Keystone Health Plan East*, 333 F.3d 450, 455 (3d Cir. 2003); *Harley* v. *Minnesota Mining & Manufacturing*, 284 F.3d 901, 906 (8th Cir. 2002)). Two of those three courts have recognized the ability of assignees-for-collection to bring suit. *Advanced Magnetics*, 106 F.3d at 17 (2d Cir.); *Gulfstream III Associates, Inc.* v. *Gulfstream Aerospace Corp.*, *supra* (3d Cir.). So has the Ninth Circuit. See note 6, *supra*. If there is some theoretical inconsistency between those lower courts' recognition of assignee-for-collection standing and their refusal to recognize representative-of-ERISA-plan standing, the argument can be addressed to any of those courts, but it is hardly the kind of "conflict" calling for resolution by this Court.

There is, in any event, no inconsistency. Nothing purports to assign legal title to plans' claims to individual ERISA beneficiaries. There is simply no reason for the analysis in the ERISA cases involving beneficiaries attempting to sue as plan representatives to have anything to do with the analysis in the cases involving actual assignments of claims. It is not surprising that two distinct bodies of law for ERISA "representative" cases and for assignee cases have coexisted in the circuits. If any circuit ever uses its ERISA "representative" case law to deny assignee standing or uses its assignee case law to grant standing to ERISA beneficiaries bringing suit in a representative capacity, there will be ample opportunity for this Court to consider whether to review the issue then. Petitioners' extremely strained claim of conflict is no reason to review the issue now.

3. The decision of the court of appeals also completely lacks practical significance beyond this case, for two reasons. First, the proposition that assignees-for-collection may bring lawsuits in federal court has been accepted for at least 87 years. The D.C. Circuit's refusal to accept a novel argument that would have departed from that accepted proposition will hardly make the D.C. Circuit a magnet for litigation by assignees-for-collection, which appears to be relatively rare in any event. Second, even under petitioners' own theory, *any* retained interest by the assignees would give them standing. Thus, even if this Court granted certiorari and reversed, lawyers in the future would be able to avoid dismissals simply by drafting agreements that allowed the assignee to retain one penny of every dollar recovered – or one penny of every thousand dollars, or one penny of every million dollars. A decision by this Court accepting petitioners' theory thus would not save the federal courts the necessity of dealing with any lawsuits, but only require counsel to draft assignment agreements slightly differently than they have drafted them for the 87 years since this Court decided *Spiller* v. *ATSF*.[9]

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[9] Petitioners strain to ascribe practical significance to the decision below because it would supposedly "call into question significant aspects of federal class action practice, including particularly the utility of opt-in class actions." Pet. 34-35. That argument is strange, because there is nothing compulsory about Rule 23. It states: "An action *may* be maintained as a class action if the prerequisites * * * are satisfied." FED. R. CIV. P. 23(b) (emphasis added). As the leading treatise puts it, "[a]nyone with individual standing who satisfies Rule 23 criteria *may* bring a class action." HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 2.01 (3d ed. 1992) (emphasis added). To be sure, it is often more efficient to bring claims as a class instead of a group of individuals, but the decision to seek class certification is left to the plaintiff,

4. Finally, it deserves note that it has been eight years since respondents first sued AT&T, and four years since the district court certified for interlocutory review under 28 U.S.C. § 1292(b) a standing question that would not otherwise be reviewable at this stage of the litigation. In hopes of a quick and definitive appellate decision, Judge Huvelle entered her 1292(b) certification *despite* recognition that delay is prejudicial to the plaintiffs. Pet. App. 61. Had she known that appellate proceedings would delay this case for four years – on top of the four years AT&T waited to bring up an issue that it now claims is so urgent as to warrant this Court's resolution – it is doubtful that she would have certified the issue at all, rather than followed "the general rule * * * that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

This Court, to be sure, has jurisdiction. But this Court has discretion as well. The issue petitioners raise is not even remotely certworthy. Even if it were certworthy, however, it would be appropriate to await another case to resolve it, and not reward petitioners

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and there is no cap on the number of claims a plaintiff can bring without it. Moreover, to the extent petitioners worry about the death of class actions – insincerely, one suspects – they need not. Courts first recognized standing for collectors nearly a century ago, and antitrust associations have sued on assigned claims for nearly thirty years, yet class actions are alive and well. Finally, petitioners' Rule 23 argument embodies the odd notion that a Federal Rule of Civil Procedure (promulgated in 1937) is relevant to the standing requirements of Article III of the Constitution (ratified in 1788).

for the number of years they have been able to drag this litigation out, first by failing to raise a jurisdictional issue for years and then by prolonging appellate proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2007

REPLY BRIEF

No. 07-552

In The

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P. & AT&T CORP.,

Petitioners,

v.

APCC SERVICES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONERS

The D.C. Circuit's ruling in this case defies foundational principles of Article III standing, in direct conflict with this Court's precedents and the decisions of other circuits. A plaintiff has standing only if it has both a stake in the outcome of its own case and the ability to litigate in its own interests. Respondents concededly have neither – they stand to win or lose nothing in this suit, and they are obligated to litigate the case entirely in the interests of the third-party PSPs. Equally troubling, the PSPs claim not to be bound by the outcome in this case if respondents – who are the PSPs' "agent[s]" (Pet. App. 117) – fail to litigate "in the [PSPs'] interest" (*id.* at 115). Contrary to the submission of the brief in opposition, the fact that respondents may be "real parties in interest" does not confer constitutional standing. This Court's intervention is warranted to review the D.C. Circuit's extraordinary departure from these basic principles of Article III standing.

I. Respondents Lack Article III Standing Because They Lack Any Interest In The Outcome Of Their Own Case.

a. Respondents miss the mark in complaining that the question presented "requires this Court to *assume* that the D.C. Circuit was wrong in concluding that respondents *do* have a personal interest in the controversy." BIO 4 (emphases in original). The D.C. Circuit held that a single consideration – the validity of the PSPs' assignment of their claims – creates a sufficient personal interest to satisfy Article III. Pet. App. 16; *see also id.* at 27 ("We hold that, as a result of the PSPs' valid assignment of their claims to the plaintiff aggregators, the aggregators have

standing to sue [petitioners] for failing to pay the PSPs dial-around compensation as required by the regulation[.]"). The petition raises the foundational question of whether that "interest" is sufficient for Article III when it carries with it no concrete interest in the outcome of this litigation, from which *all* the proceeds will go to the PSPs. *See* Pet. 4; Pet. App. 7, 9-10, 120, 124-25.

The requirement that the plaintiff have a concrete stake in the outcome of its own case from which it would personally benefit is a cornerstone of Article III standing jurisprudence. What respondents disparage as a "razor-thin distinction" and "radical theory" (BIO 5, 8) is, in fact, the very essence of constitutional standing. *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) ("[T]he point [of the Court's Article III standing inquiries] has always been the same: whether [the] plaintiff 'personally would benefit in a tangible way from the court's intervention.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1974)) (second alteration in original); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (Article III requires a "concrete private interest in the outcome of [the] suit").

The D.C. Circuit rendered the fundamental separation-of-powers principle embodied in Article III a mere inconvenience to be contracted around. Any party may pay his attorney, a bill collector, or any other person with no personal interest or exposure to litigate a claim in the payee's name, even though the payee has no stake in the case and the real party can seek to disavow any adverse judgment that might result in that shadow litigation. *See* Pet. 22-23.

b. Unsurprisingly, this Court's precedents forbid such facile evasion of Article III. *Vermont Agency of Natural Resources v. United States ex rel. Stevens* held that the standing of a *qui tam* relator – an "assignee" of the claim of the United States – depends critically on the "bounty" the relator receives for successful litigation under the False Claims Act. 529 U.S. 765, 772 (2000). Respondents claim to have searched that decision "in vain for *any* indication by this Court – let alone a holding –" that a personal bounty is required. They overlook, however, this Court's central conclusion that the relator's "portion of the recovery – the bounty he will receive if the suit is successful – provides the 'concrete private interest in the outcome of [the] suit'" that Article III requires. *Id.* at 772 (quoting *Lujan*, 504 U.S. at 573) (alteration in original). The Court underscored that point by resting its ruling on the historical tradition of statutes providing for a bounty (*id.* at 776-77) and cases in which the assignee uniformly received a share of the proceeds of the suit (*see* Pet. App. 30-31 (Sentelle, J., dissenting)).

Respondents also maintain that they have standing under *Vermont Agency* because the Court in that case, "speaking through Justice Scalia and without dissent on the relevant proposition, reaffirmed 'the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor.'" BIO 5 (quoting 529 U.S. at 773). But respondents wrench that language from its context. After concluding that the bounty did not *alone* confer standing – because "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing" (529 U.S. at 772) – the Court actually stated: "We believe, how-

ever, that adequate basis for the relator's suit *for his bounty* is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773 (emphasis added).

The point is illustrated by *United States ex rel. Gebert v. Transportation Administration Servs.*, 260 F.3d 909 (8th Cir. 2001). In that case, the *qui tam* relators went bankrupt before filing suit. Although their claim "passed to the bankruptcy estate," they argued that they nonetheless had "standing to bring the *qui tam* claim because it is the United States' injury-in-fact that imparts standing to the Geberts, not the Geberts' own injury in fact." *Id.* at 913. The relators thus advanced precisely the interpretation of *Vermont Agency* that respondents press here: that the injury of the assignor is sufficient standing alone to confer standing. But the Eighth Circuit squarely rejected that argument, explaining that *Vermont Agency* "framed the issue of a *qui tam* relator's Article III standing around the potential recovery that the relator may realize from the claim." *Id.* at 914. In words that speak directly to respondents' argument, the Eighth Circuit held that the relators lacked standing because they "no longer ha[ve] an interest in any damages because the claim is no longer [theirs] * * *, *i.e.*, there was no 'bounty' that they would be entitled to in the event their claim was successful." *Id.* Other leading judges recognize *Vermont Agency*'s clear holding.[1]

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[1] *Glanton v. AdvancePCS*, 465 F.3d 1123, 1126 n.3 (9th Cir. 2006) (Kozinski, J.) (premise of *Vermont Agency* is that the "*qui tam* relator has an interest in the outcome of the lawsuit be-

c. The petition also demonstrated that the decision below conflicts with decisions of other circuits, which have faithfully applied this Court's precedents, including the holding of *Vermont Agency* that an "assignee" has Article III standing only if it has a personal interest in the outcome, such as a *qui tam* "bounty." *See* Pet. 19-22.

Respondents invoke the Second Circuit's recognition that "[t]here are also situations" in which a "valid and binding assignment of a *claim*" may confer Article III standing. BIO 10 (citing *Connecticut v. Physicians Health Servs.*, 287 F.3d 110, 117, *cert. denied*, 537 U.S. 878 (2002)) (emphasis in original). But respondents overlook the Second Circuit's specific recognition that in all those "*situations*" the assignees (in contrast to respondents here) "stood, personally and individually, to recover a monetary award." 287 F.3d at 118 (citing, *inter alia*, *Vermont Agency*, *supra*). *Accord Connecticut v. Health Net, Inc.*, 383 F.3d 1258, 1261 & n.2 (11th Cir. 2004). Nor was the Second Circuit "reiterating" a distinction drawn in its prior decision in *Advanced Magnetics, Inc. v. Bayfront*, 106 F.3d 11 (1997), which it did not cite. *Contra* BIO 10. *Advanced Magnetics* does not broadly "recog-

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cause he stands to gain a part of the recovery. * * * The balance of the opinion deals with the difficult question of whether Congress *may* give a third party a stake in a lawsuit seeking to redress the invasion of somebody else's rights"); *Judicial Watch v. United States Senate*, 432 F.3d 359, 363 (D.C. Cir. 2005) (Williams, J., concurring) ("absent the partial assignment the bounty would no more qualify than would a 'wager on the outcome'") (quoting *Vermont Agency*, 529 U.S. at 772); Pet. App. 29 (Sentelle, J., dissenting) (precedents such as *Vermont Agency* accept *qui tam* standing because the relator has "an actual interest in the recovery").

nize[] the ability of assignees for-collection to bring suit" (*contra id.* at 12) – the decision did not involve Article III standing but instead merely acknowledged that the *validity* of an assignment "is not affected by the parties' agreement that the transferee will be obligated to account for the proceeds." 106 F.3d at 17.[2]

Respondents would distinguish *Glanton v. AdvancePCS*, 465 F.3d 1123 (9th Cir. 2006), on the ground that it "did not involve an assignment at all." BIO 11. But that only underscores the magnitude of the D.C. Circuit's Article III error here. Given that the *Glanton* plaintiffs possessed a right to sue directly conferred *by Congress* (*see* 29 U.S.C. 1109, 1132(a)), they had a stronger claim to standing than respondents because their right was not purely derivative. Respondents also quote the Ninth Circuit's observation that, "whereas *qui tam* actions have existed for centuries, there is no similar tradition of unharmed ERISA beneficiaries bringing suit on behalf of their plans." BIO 11 (quoting *Glanton*, 465 F.3d at 1125). But that ignores both that respondents similarly have no deep historical tradition underlying their suit for the PSPs and the Ninth Circuit's conclusion in the very next sentence that, "*[m]ore importantly*, the [False Claims Act] assigns relators a concrete stake in *qui tam* cases by giving them a piece of the action. ERISA gives plan beneficiaries nothing[.]" 465 F.3d at 1125-26 (emphasis added).[3]

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[2] Respondents also fail to explain why Connecticut lacked standing on their understanding of Article III, given that the State (as the participants' assignee) unquestionably was a "real party in interest."

[3] Respondents also have no answer to the petition's showing that they in any event lack "prudential standing," given that the

II. Respondents' Status As "Real Parties In Interest" Has No Bearing On Their Article III Standing.

Although respondents assert that the "widespread conclusion that an assignee-for-collection *may* bring a lawsuit in federal court" is "stated consistently in hornbooks and cases" (BIO 7 (emphasis in original) (footnotes omitted)), every authority they cite merely states that the assignee is the "real party in interest." *Id.* at 7 nn.5 & 6. Respondents' claim that petitioners' argument implies that "every treatise writer has simply overlooked an Article III defect and focused on the wrong legal question" (*id.* at 8) ignores that those treatise writers in fact consistently draw the critical distinction that "elements of the standing doctrine are clearly unrelated to the rather simple proposition set out in Rule 17(a), and plaintiff must both be the real party in interest *and* have standing." 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1542, at 330 (2d ed. 1995) (emphasis added).

Respondents further argue (BIO 9) that this Court's Article III precedents "do not purport to disavow, for standing purposes," *Spiller v. Atchinson, Topeka & Santa Fe Ry.*, 253 U.S. 117 (1920), or *Titus v. Wallick*, 306 U.S. 282 (1939). But it is more telling that this Court's Article III's precedents do not view *Spiller* and *Titus* as *relevant* to the standing inquiry. As *amicus* Qwest explains at length (Br. 12-17), nei-

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right of action to sue for dial-around compensation was created specifically for the benefit of the PSPs. *See* Pet. 24-25. Indeed, respondents reinforce that point when they emphasize that "respondents sued petitioner AT&T for failure to pay payphone service providers (*PSPs*) amounts *they* were owed under FCC rules." BIO 1 (emphasis added).

ther case addressed standing; indeed, both predated the development of Article III standing doctrine altogether. *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) ("'drive-by jurisdictional rulings' * * * should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit") (quoting *Steel Co.*, 523 U.S. at 91).[4]

Respondents, like the majority below, assert that there is "'no basis for distinguishing the personal stake required under Rule 17(a) from the interest required for standing.'" BIO 4 (quoting Pet. App. 16). But, in fact, there is every reason to distinguish the two, and respondents completely miss the irony of their criticism of "the odd notion that a Federal Rule of Civil Procedure (promulgated in 1937) is relevant to the standing requirements of Article III of the Constitution (ratified in 1788)." BIO 14 n.9. Rule 17(a) *has no* "personal stake" requirement: the only decision cited by the D.C. Circuit for that proposition rejects the argument that the requirements of Rule 17(a) and Article III are equivalent. *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992); *see also* Pet. 23-24 & n.4 (collecting additional cases). As the petition explained and respondents do not contest, the two requirements serve different purposes: Rule 17(a) ensures that the judgment is entered for or against the correct party; Article III ensures that the judicial power is only invoked to resolve actual cases or con-

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[4] Those decisions are also properly distinguished because in *Titus* the assignor's obligation to pay the assignee's debts from the proceeds of the case gave the assignee an interest in the outcome (306 U.S. at 286), and in *Spiller* the assignors (unlike respondents here) were members of a common association (253 U.S. at 122-23).

troversies. In particular, Article III requires that there be "concrete adverseness" (*Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 486 (1982) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)) between the opposing parties, to prevent federal courts from issuing advisory decisions and thus exceeding their constitutionally delimited role in a system of separated powers. *See* Pet. 17. That is not a concern of Rule 17(a).[5]

III. Respondents' Remaining Arguments Against Review Lack Merit.

The importance of the question presented cannot be gainsaid. Respondents brought this lawsuit on behalf of more than 1400 PSPs from around the nation, more than 99.5% of whom are not participating in this case but instead "assigned" their right to litigate to respondents. As respondents advised this Court in their own previous petition for certiorari, "Lawsuits to recover unpaid compensation have been filed in district courts around the country." Petition for Cert. at 30, *APCC Servs., Inc. v. Sprint Commc'ns Co.* (No. 05-766). As the district court detailed in concluding that "[r]esolution of this question would also assist many other courts in resolving similar disputes" (Pet. App. 79), in addition to this case and the suit against *amicus* Qwest, "the PSPs and aggregators have filed *numerous suits throughout the country* against com-

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[5] It is thus not the case that any "interest" – for example "one penny of every dollar recovered" (BIO 13) – is sufficient to confer standing. In every case, the court must evaluate whether the plaintiff has a genuine – rather than *pro forma* – interest in the outcome of the suit so as to satisfy itself that concrete adversity exists between the parties.

mon carriers based on * * * an assertion of standing based on assignments executed by the PSPs." *Id.* at 71 & n.9 (citing five suits in five different circuits) (emphasis added). *See also id.* at 71 (noting "the rash of these cases countrywide").

The troubling consequences of the D.C. Circuit's contrary ruling are serious and uncontested, and extend far beyond the context of payphone litigation. As noted, the PSPs claim the right not to be bound by the judgment *at all*. Respondents also seemingly embrace the conclusion that their position permits the easy evasion of the strictures of Rule 23 class action procedures. BIO 13 n.9. Equally disturbing, as *amicus* Qwest describes (at 4-5), are the great difficulties in securing discovery from the non-party PSPs – which petitioners have experienced as well because respondents have steadfastly disclaimed any obligation to produce discovery from the PSPs (*see generally* AT&T Corp.'s Memorandum in Support of Its Motion to Compel, *APCC Servs., Inc. v. AT&T Corp.* (D.D.C. No. 1:99-cv-696)) – and the substantial doubts regarding whether counterclaim judgments can be secured against them.

Finally, there is no merit to respondents' contention (BIO 14-15) that the case has been unduly delayed. Petitioners did not move to dismiss this suit for lack of standing at the outset because they had no way of knowing that respondents lacked any personal interest in the case – as respondents know well, that fact only emerged much later in discovery, which was stayed and consequently greatly delayed. Respondents moreover argue at cross-purposes with themselves in contending that this litigation is longstanding, when the alternative they propose is that review

of the question of standing should be still further "deferred until final judgment." BIO 14 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)). At bottom, respondents are merely attempting to reargue the district court's conclusion that "it would be far better for all concerned" to resolve the standing question before the parties are put to the great cost and distraction of trial. Pet. App. 61. Indeed, the point of the case or controversy requirement is to *avoid* the type of potentially advisory litigation that respondents insist petitioners should be forced to litigate for years against a party which has no stake in the outcome.[6]

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[6] Petitioners also note the pendency of two other petitions for certiorari involving the Article III requirement that the plaintiff have suffered a concrete, personal injury. *WKB Assocs. v. Fair Housing Council* (No. 07-421) (like this case, set for the January 4, 2008 conference); *Summers v. Earth Island Inst.* (No. 07-463) (to be set for the January 11, 2008 conference).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 2007

AMICUS CURIAE BRIEF

No. 07-552

IN THE

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P. and AT&T CORP.,

Petitioners,

v.

APCC SERVICES, INC., *et al.*,

Respondents.

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QWEST'S INTEREST

Qwest Communications Corporation ("Qwest") has a direct interest in the outcome of this appeal because Qwest is a defendant in a virtually identical lawsuit brought by these Respondents. This Court's ruling will directly affect a critical defense Qwest asserted in this other lawsuit.[1]

Qwest is one of the nation's largest providers of long-distance telecommunication services, including toll-free (800-number) services. Since 1996, when the Federal Communications Commission ("FCC") imposed requirements for carriers to pay compensation, Qwest has paid hundreds of millions of dollars in "dial-around compensation" to numerous payphone owners.

On the same day that APCC Services, Inc. and the other plaintiffs (jointly "Aggregators") filed their lawsuit against Petitioner Sprint Communications Company L.P. ("Sprint"), Aggregators also filed a virtually identical lawsuit against Qwest, *APCC Services, Inc. v. Qwest Communications Corporation*, No. 01-641 (D.D.C. filed Mar. 23, 2001) ("*APCC v. Qwest*"). Aggregators' lawsuit against Qwest proceeded on a different path from the cases against AT&T Corp. ("AT&T") and Sprint. The Judicial Panel on Multidistrict Litigation transferred the *APCC v. Qwest* case to the U.S. District Court for the Central District of California in 2002. The case was

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

transferred back to the District of Columbia in 2006—after AT&T and Sprint had already begun prosecuting the appeal that has led to their Petition. Consequently, Qwest is not a party to this appeal.

Nonetheless, this Court's disposition of AT&T's and Sprint's petition for a writ of *certiorari* directly affects Aggregators' case against Qwest. If this Court grants the petition and ultimately agrees with AT&T and Sprint that Aggregators lack standing, that ruling will result in the dismissal of Aggregators' case against Qwest as well. On the other hand, if this Court rules in Aggregators' favor, the lower court will be bound to follow that precedent, and Qwest will have no realistic opportunity to reverse this Court's ruling in later appeals of the *APCC v. Qwest* case.

For these reasons, Qwest submits this brief as *amicus curiae* in support of AT&T's and Sprint's Petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

The D.C. Circuit's terse, superficial conclusion that Aggregators have an "interest" sufficient to satisfy Constitutional standing requirements is contrary to basic principles of civil procedure, and leads to unreasonable and unfair results. For instance, with Aggregators as plaintiff, Qwest and other defendants can obtain only very limited third-party discovery from the payphone service providers ("PSPs"), making it extraordinarily difficult for defendants to prove their affirmative defenses. Furthermore, it is unlikely that Qwest could collect on its counterclaims from Aggregators.

Aggregators' response is that these problems are the inevitable cost of efficiently combining 1,400 claims in a single lawsuit. However, that supposed efficiency results in Qwest being denied rights afforded by the Federal Rules of Civil Procedure. Aggregators' case against Qwest is a *de facto* class action, possessing all of the hallmarks of a class action, but without any of the protections or mandatory requirements of Rule 23. Allowing the case to proceed would create a dangerous precedent, encouraging other litigation agents to sidestep the class action rules and prosecute claims on behalf of numerous, disparate nonparties, while shielding those nonparties from discovery or counterclaims.

The D.C. Circuit's opinion deviates from other Federal Rules, in addition to Rule 23, and relies on old rules of standing, superseded by this Court's more recent pronouncements. The D.C. Circuit erroneously elevated Rule 17(a) to a jurisdiction-creating rule, in violation of the express limitation contained in Rule 82.

Qwest respectfully encourages this Court to grant the Petition, issue a writ of *certiorari*, and reverse the D.C. Circuit's opinion that Aggregators have standing.

ARGUMENT

I. Allowing Aggregators To Have Standing Deprives Qwest And Other Defendants Of Significant Procedural Guarantees Contained In The Federal Rules Of Civil Procedure

Allowing Aggregators to proceed with this lawsuit in their name, without the actual participation of the PSPs, creates severe procedural disadvantages for defendants such as Qwest and affords Aggregators an unfair tactical advantage.

A. First, if the Court rules that Aggregators have standing, Qwest and other defendants, such as AT&T and Sprint, would be deprived of the ability to take discovery from the claimants themselves—the PSPs. None of the important discovery tools contained in Federal Civil Procedure Rules 26 through 37 are available as to the PSPs in a meaningful fashion. Because the PSPs are not parties, defendants cannot serve them with written interrogatories or requests for admission. At best, defendants can serve Rule 45 subpoenas on the PSPs, but with 1,400 PSPs' claims at issue here, that would be physically and economically unrealistic. Few, if any, of the PSPs are subject to the personal jurisdiction of the district court in the District of Columbia, so the subpoenas would need to be served nationwide. Disputes about the scope of the subpoenas would be litigated in miscellaneous actions nationwide, likely in every federal judicial district. Courts around the country would have to individually resolve identical arguments about the proper scope of discovery under the subpoenas, leading to a patchwork of inconsistent results.

In AT&T's lawsuit with the Aggregators, the court authorized ***informal*** discovery on the PSPs, but the results proved that informal discovery is no replacement for the formal tools of the federal civil rules. Aggregators and AT&T sent "questionnaires" to all of the PSPs, effectively seeking information normally obtained through interrogatories and document requests. AT&T has reported that very few of the PSPs responded meaningfully, basically frustrating AT&T's efforts. Qwest and other defendants face the prospect of accepting haphazard results from informal discovery in lieu of the procedural guarantees to which all defendants are entitled under the Federal Rules. That unfairness demonstrates the fundamental problem of granting the Aggregators "standing" even though they have no direct interest in the lawsuit.

B. Second, if defendants prevail on their counterclaims, it cannot be guaranteed that they could collect on those counterclaims without filing actions around the country. While Aggregators allege that Qwest has underpaid dial-around compensation to the PSPs, Qwest has filed a counterclaim alleging that Qwest has in fact overpaid dial-around compensation in the past and is entitled to reimbursement of these overpayments. (AT&T and Sprint have filed similar counterclaims.) It is unclear if Qwest would be able to enforce a judgment on its counterclaim against Aggregators. The PSPs assigned to the Aggregators the right to pursue a ***collection*** action; nowhere is it apparent that the PSPs assigned their ***liabilities*** to the Aggregators. (*See* Appendix to Petition ("App.") 114-127.) A judgment that Aggregators, the counterclaim defendants, must reimburse Qwest could be illusory; Aggregators long ago

distributed Qwest's dial-around compensation to the PSPs, so Aggregators are not "holding the money." The district court would have to order Aggregators to pass a hat and take up a collection from the PSPs, and it is not difficult to predict that the PSPs' participation in such an order would be minimal.

Qwest, again, would be forced to file actions around the country to enforce the judgment of the district court. Besides the obvious expense and difficulty, the question arises whether some PSPs might even argue that the judgment on Qwest's counterclaim in the *APCC v. Qwest* lawsuit is not binding on them.

C. It is fundamentally unfair to procedurally hamper Qwest's defense of a federal lawsuit merely to accommodate the mechanism the PSPs employed to pursue their claims. The defendants in these lawsuits had no role in the PSPs' choice to assign their collection action to the third-party Aggregators; yet it is defendants that cannot effectively collect evidence directly from the PSPs to defend themselves or to collect judgments on any counterclaims. The D.C. Circuit did not appear to consider any of these problems, but tersely allowed the case to go forward on the grounds that the Aggregators have a supposed "interest" in the case.

II. The Aggregators Are Pursuing A *De Facto* Class Action Without Satisfying The Mandatory Requirements Of Rule 23

That a single lawsuit may be more efficient than 1,400 lawsuits does not mean that the single lawsuit is appropriate. This issue arises time and again with respect to class actions. Here, Aggregators and their PSP customers are attempting to consolidate class-wide claims into a single lawsuit without ever having to satisfy Rule 23's mandatory requirements for a class action.

A. This lawsuit is a *de facto* class action, bearing all of the hallmarks of such a case. A small number of named plaintiffs are pursuing claims on behalf of a class of 1,400 separate claimants. The claims result from a "common" issue—defendant Qwest's procedures and computer systems for tracking dial-around calls and paying compensation to the PSPs. Aggregators argue, in their effort to seek "associational" standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), that their claims do not require the participation of the PSPs. Any class representative would make this same argument.

Congress and the federal courts have constructed important procedural safeguards to ensure that class actions proceed only if mandatory requirements are present. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'") (quoting 28 U.S.C. § 2072(b)); Fed. R. Civ. P. 23 advisory committee's notes

(Rule 23 amended into modern form because "the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness"). Even though a single lawsuit is always more efficient, in many cases it is inappropriate because the nature of claims and defenses necessitates that individual suits be filed—even if that requires thousands of lawsuits. *See Amchem Prods.*, 521 U.S. at 597, 626 (denying certification of class of "hundreds of thousands, perhaps millions" for settlement purposes because "[i]n significant respects, the interests of those within the single class are not aligned"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079, 1090 (6th Cir. 1996) (class of 12,000 to 15,000 alleged members decertified where plaintiff established numerosity requirement of Rule 23 but no other requirements).

None of the procedural protections inherent in Rule 23 has been addressed here. The district court has never decided any motions under Rule 23 in the *APCC v. Qwest* lawsuit; Aggregators have never been forced to prove that the mandatory requirements of Rule 23 are present. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1988 n.13 (2007) ("Rule 23 requires 'rigorous analysis' to ensure that class certification is appropriate.") (citing *General Tel. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied") and *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006) ("It would seem to be beyond dispute that a district court may not grant class certification without making a determination that all of the Rule 23 requirements are met.")).

It is doubtful that this case could ever be certified as a class action. First, the requirement of "typicality" in Rule 23(a)(3) is not met, because the named plaintiffs (the Aggregators) do not have a "claim" of their own and thus are not "typical" of the class. *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) ("As this court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.") (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). Second, it is far from clear if a class could be certified under Rule 23(b)(3) given the individualized issues for particular PSPs. *See* Fed. R. Civ. P. 23(b)(3); *Amchem Prods.*, 521 U.S. at 622. Each PSP must present affirmative evidence of its entitlement to compensation, including ordering certain services from its local phone company that would allow Qwest and other IXCs to identify its payphones as being entitled to compensation. Qwest also has individualized affirmative defenses, such as contractual waivers many PSPs signed waiving their right to compensation from Qwest. These would provide grounds to deny certification under Rule 23.

Aggregators argue that a class would be certified despite these issues, but their rhetoric merely proves Qwest's point. A district court should hear both sides' arguments and decide if class certification is appropriate before allowing Aggregators to proceed with a lawsuit on behalf of the class of PSPs. That has never happened, and never will happen, if the Aggregators are deemed to have standing as assignees.

The Court should consider the hole in Rule 23 that the D.C. Circuit opinion has created. A class of claimants could assign their claims to a single third party precisely as PSPs have done here—as pass-through collection claims. Rule 23 would be avoided entirely, and none of the guarantees in Rule 23(a) or Rule 23(b)(3) would ever be addressed in the litigation.

Thus, Qwest, AT&T, and Sprint are being forced to defend a *de facto* class action when the case would not qualify as a class action. This is grossly unfair and yet another result of the Aggregators and PSPs' collusion to have Aggregators pursue the collection claims as assignees.

B. Aggregators and the PSPs affirmatively chose to avoid Rule 23 and instead have Aggregators pursue the claims as assignees.

In 2003, six of the Aggregators' PSP customers filed their own lawsuit against Qwest for the very same dial-around compensation claims at issue in *APCC v. Qwest*. *D&B Tel. Co. v. Qwest Commc'ns Corp.*, No. 03-01443 (D.D.C. filed June 30, 2003) ("*D&B*"). The lawsuit was styled as a putative class action on behalf of a class of all of the PSPs whose claims are currently at issue in the *APCC v. Qwest* lawsuit. These six plaintiff PSPs characterized their lawsuit as "protective," in the event that Aggregators are ultimately deemed not to have standing. The same counsel for Aggregators in the *APCC v. Qwest* case filed the *D&B* case.

In the *D&B* case, the six PSPs moved for class certification, and the parties fully briefed Rule 23 requirements. All of the foregoing issues, and more, were addressed in these briefs.

Aggregators chose to abandon the class-action case, however, when this Court remanded the Aggregators' lawsuit against AT&T and Sprint—and, effectively, the lawsuit against Qwest—earlier this year. Counsel for the Aggregators and the six *D&B* plaintiffs told the district judge that they had no intention of pursuing the *D&B* class-action case—and the district judge stated that she considered the case "closed," and no further action would be taken. Shortly thereafter, in a brief to the district court, the Aggregators argued that the *D&B* case was filed without the PSPs' authority, and thus the federal court lacked subject-matter jurisdiction over it. Based on that statement, Qwest has filed a Motion to Dismiss under Rule 12(h)(3). The *D&B* plaintiffs do not oppose dismissal of the case without prejudice.

Aggregators thus have ensured that their claims will not be heard as a class action, even though that is exactly the kind of case they are pursuing. The D.C. Circuit never considered these problems when concluding that Aggregators have an "interest" sufficient to satisfy Constitutional requirements. The Court should not allow a party to have "standing" based on assignment where the result would be a unilateral dismantling of critical procedural safeguards in Rule 23.

III. Aggregators Rely On Doctrines And Cases That Do Not Reflect Modern Standing Principles

Besides these practical problems, the conclusion that Aggregators have standing is not consistent with current precedent.

A. Aggregators wade deep into this Court's distant precedent, citing two cases that are ***not standing*** decisions—*Titus v. Wallick*, 306 U.S. 282 (1939) and *Spiller v. Atchison, Topeka & Santa Fe Railway*, 253 U.S. 117 (1920). Aggregators assert that in *Titus* and *Spiller*, this Court "recognized that an assignee has standing regardless of whether it must account to an assignor . . . ," and that adopting Petitioners' position would require the Court to overrule *Titus* and *Spiller*. That Aggregators must reach so far back to rely on cases that have nothing to do with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), or other relevant cases, should speak loudly.

Neither *Titus* nor *Spiller* addressed whether the parties had Article III standing to bring suit. Indeed, neither decision contains any reference to the concept of "standing." If *Spiller* and *Titus* were binding precedent governing the standing of those who sue under an assignment to collect money for the assignor, this Court presumably would have cited them in *Vermont Agency*. But *Vermont Agency* made no reference to either *Spiller* or *Titus*. Indeed, this Court has never once cited either decision in a standing case.

Moreover, even if *Titus* and *Spiller* had addressed standing, the result in those cases would be different under the Court's modern standing jurisprudence as expressed in *Lujan* and *Vermont Agency*.

In *Titus*, Titus sued Wallick in New York state court and obtained judgment against him. 306 U.S. at 285. Titus then sued Wallick in Ohio state court to recover on that judgment. Federal court standing was thus not at issue in either of these state court proceedings. Evidence was introduced in the Ohio suit that, before filing the New York suit, Titus had assigned his claim to his brother, who then reassigned the claim back to him for purposes of collection. *Id.* at 286. The Ohio courts concluded that the reassignment for the purpose of collection was a mere power of attorney that had given Titus no right to prosecute the New York suit against Wallick and declined to enforce the judgment. This Court held that an assignment for collection was valid under New York law, and that it did not matter, for full faith and credit purposes, whether such an assignment would be valid under Ohio law if Titus had initially sued there. *Id.* at 288-89, 291. *Titus* did not mention and did not involve standing in federal court and was decided long before the development of modern standing jurisprudence.

Aggregators also rely on the even older case of *Spiller*. That litigation commenced in 1904 when the Cattle Raisers' Association of Texas, on behalf of its members, petitioned the Interstate Commerce Commission ("ICC") for reparations under section 13 of the Commerce Act, alleging that rates charged by a number of railroads for the shipment of cattle were

unjust and unreasonable. *Id.* at 124-25. This Court noted that the Commerce Act gave the ICC "a large degree of latitude" in processing reparation claims. *Id.* at 126, 131. The Commission issued an order in 1914 awarding reparations to Spiller, the Secretary of the Association. *Id.* at 120. When the railroads refused to pay, Spiller commenced an action in federal court to enforce the ICC's order. Spiller thus went to federal court in the same posture as Titus—to enforce a legal order of another tribunal. This Court concluded that Spiller had legal title to the reparation claims by virtue of assignments for collection from the cattle-raiser members. *Id.* at 134-35.

B. These cases may stand for the proposition that these two plaintiffs had a legal right to bring suit under the substantive law at the time, but they do not stand for the proposition that the plaintiffs had the now-requisite personal stake in the outcome of the suits under *Lujan* or *Vermont Agency*. This Court did not discuss standing as an Article III limitation until 1944 in *Stark v. Wickard*, 321 U.S. 288 (1944), and it was not until *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), that a significant number of standing cases emerged.[2] Cass R. Sunstein, *What's Standing After Lujan?*

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2. This Court has never cited either decision in a modern-era standing case. In fact, this Court has not cited *Spiller* for any purpose since 1966, nor *Titus* since 1951. In the Courts of Appeals, the few cases citing *Spiller* in the last 30 years have cited it for its evidentiary rulings, not its discussion of assignments. *Titus* was cited in *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11 (2d Cir. 1997). But *Advanced Magnetics* did not cite *Titus* as a standing case. Instead, it cited *Titus* when discussing whether an assignee who was required to

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Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 169 (1992). At the time *Spiller* was decided, the analysis of whether a party was a proper plaintiff focused on *legal right*, not *injury-in-fact*, so it is useless for analyzing standing:

> [W]hat we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue. To have standing, a litigant needed a legal right to bring suit.
>
> The notion of injury in fact did not appear in this period. The existence of a concrete, personal interest, or an injury in fact, was neither a necessary nor a sufficient condition for a legal proceeding. People with a concrete interest could not bring suit unless the common law, or some other source of law, said so. But if a source of law conferred a right to sue, "standing" existed, entirely independent of "concrete interest" or "injury in fact."

Id. at 170.

(Cont'd)

remit to the assignor funds the assignee collected on the assignor's claims could sue on those claims "in its name." *Id.* at 17-18. Indeed, the Court framed its holding in real-party terms, not in terms of standing: "[W]e conclude that the district court properly ruled that the agreements were insufficient to transfer to [the assignee] ownership of the claims [of the assignors] and hence were insufficient to permit [the assignee] to sue on those claims in its name." *Id.* at 18.

Standing today depends on current precedent, not that from 1920. It is not a substitute for that analysis to point to earlier cases that were entertained without a discussion of a potential jurisdictional flaw. Such cases do not "provide binding precedent on that issue." *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1091 (9th Cir. 2002) (finding no federal question jurisdiction and rejecting argument that the court "must exercise jurisdiction because we have previously done so in three cases"); *see also Common Cause v. Federal Election Comm'n*, 108 F.3d 413, 416 (D.C. Cir. 1997) (stating that standing was an "open question" despite two prior cases in which Common Cause was allowed to challenge FEC action because both cases "predate the Supreme Court's decision in *Lujan*" and neither "include[d] a ruling on the issue of standing"). For the same reasons, *Titus* and *Spiller* are not binding precedent on the standing issue here.

C. The D.C. Circuit improperly applied *Titus* as well. It held that Aggregators have a sufficient "interest" for standing under *Lujan* because their interest is the same as a "real party in interest" under Rule 17(a), notwithstanding the fact that they must "account" for the full proceeds of the lawsuit to their customers. *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238, 1244-45 (D.C. Cir. 2005), *vacated and remanded*, 127 S. Ct. 2094 (2007). However, Rule 17(a) cannot itself provide jurisdiction, for the civil rules cannot extend jurisdiction where it otherwise is wanting. Fed. R. Civ. P. 82. The D.C. Circuit instead has to look elsewhere, beyond the text of the Rule, for the proposition that Aggregators have an interest sufficient to satisfy the requirements in *Lujan*. For that, the only cases the D.C. Circuit cited

were *Titus* and *Advanced Magnetics*—but, as just explained, these two cases have ***nothing*** to do with standing as it is articulated in *Lujan* and *Vermont Agency*. The D.C. Circuit's invocation of Rule 17(a), therefore, is not dispositive.

If the D.C. Circuit's conclusion about an "interest" under Rule 17(a) were true, then the Court's analysis in *Vermont Agency* was illusory. The *qui tam* relator would have had a "concrete interest" in the lawsuit due to the statutory assignment of the claim, without regard to whether the relator kept any proceeds of the lawsuit—indeed, if the D.C. Circuit were right, then the relator could have kept none of the proceeds but still had an interest sufficient to prosecute the case. But this Court very pointedly based its analysis in *Vermont Agency* on the specific fact that the relator, as assignee, retained a "bounty" (a substantial portion of the proceeds of the lawsuit) to satisfy the Constitutional requirement for standing as articulated in *Lujan*. *Vermont Agency*, 529 U.S. at 769-70.

IV. Denying Aggregators Article III Standing Will Not Upset Antitrust Or Bankruptcy Law

Aggregators argue that, if they do not have standing, then neither would bankruptcy trustees nor certain types of plaintiffs in specialized antitrust cases. Not so.

A. Bankruptcy trustees, who sue on behalf of the estate, are readily distinguishable from the Aggregators here. A bankruptcy trustee is an officer of the court. *King v. United States*, 379 U.S. 329, 337 & n.7 (1964); *In re Castillo*, 297 F.3d 940, 945-46 (9th Cir. 2002). Section

323 establishes the trustee as representative of the estate with the capacity to sue and be sued. 11 U.S.C. § 323. Congress has expressly recognized a trustee's standing to sue. 11 U.S.C. § 307 ("The United States Trustee may raise and may appear and be heard on any issue in any case or proceeding under this title. . . ."); *see also In re Donovan Corp.*, 215 F.3d 929, 930 (9th Cir. 2000).

Trustees litigate as representatives of the bankruptcy estate, an inchoate entity— recognized in the law by the Constitution (Art. I, § 8) and subsequently defined by federal statute—that holds the assets of the debtor. The trustee is the human being who acts on behalf of the bankruptcy estate, an incorporeal entity obviously incapable of itself participating in litigation. The personal interests of the trustee cannot be severed from those of the estate— unlike the Aggregators and their client PSPs, who merely engage in a business transaction.

Case law regarding bankruptcy trustee standing illustrates the point. The bankruptcy trustee satisfies Article III's "personal stake" requirement in litigation brought on behalf of the bankruptcy estate because the trustee "stands in the shoes of the bankrupt corporation" and has no interest other than those of the corporation. *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991); 11 U.S.C. §§ 541-542. For purposes of suit, there is no distinction between the trustee and the estate. Indeed, the identity between trustee and estate is so integral to standing analysis that the trustee lacks standing to bring suit on behalf of any entity other than

the estate (such as a creditor), even if the claim is assigned to the trustee. *In re Bennett Funding Group, Inc.*, 336 F.3d 94, 102 (2d Cir. 2003).

B. Aggregators also liken themselves to antitrust associations. Although antitrust associations are sometimes formed to file claims assigned to them by members, this process results from special antitrust rules regarding the proper party to bring suit. For purposes of Article III standing, antitrust associations, like any other membership association, can sue only if they have a proprietary interest in a claim or because they satisfy the test for associational standing. *See, e.g., Associated Gen. Contractors of N.D. v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979).

Moreover, the antitrust laws themselves impose limits on the proper party to bring suit. Aggregators rely on a case that explains, "[w]hile an association may not sue on its own to assert the rights of its members *under the antitrust laws*, it may sue as assignee of the legal rights of others." *Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1207-08 (9th Cir. 1975) (emphasis added); *accord Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 438-39 (3d Cir. 1993) (Greenberg, J., concurring) (discussing rationale behind assignment of "antitrust injury"). Reflecting this doctrine, the cases Aggregators cite that substantively address claims assignments evaluate the assignments to determine whether the plaintiffs are the proper parties to bring suit *under the special rules governing antitrust. See Klamath-Lake Pharm. Ass'n*

v. Klamath Med. Serv. Bureau, 701 F.2d 1276 (9th Cir. 1983); *Pacific Coast*, 526 F.2d at 1207-08. Importantly, not one of these cases addresses Article III standing.

No basis exists to extend the laws of bankruptcy and antitrust litigation, developed in statutory regimes *sui generis*, outside of their unique contexts. A ruling that Aggregators lack standing will have no effect on the statutes and precedent underlying these other situations.

V. Aggregators Lack Associational Standing

Finally, Aggregators do not possess "associational standing" under *Hunt*. The D.C. Circuit correctly avoided this argument because it has no merit, for several independently dispositive reasons.

Aggregators fail the threshold requirement. Associational standing applies to a membership association, or its functional equivalent, "bring[ing] suit on behalf of its members." *Hunt*, 432 U.S. at 343-44. The Aggregators are not membership organizations. They are ***commercial*** for-profit entities, suing on behalf of ***their customers.*** No court has ever recognized "associational standing" on behalf of a commercial entity. Indeed, in the D.C. Circuit opinion under review, Judge Sentelle's dissent recognized that Aggregators are not "associations" as the term is used in *Hunt*. *APCC Servs.*, 418 F.3d at 1252. A toy store cannot sue a toy manufacturer on behalf of its customers who bought defective toys.[3]

3. One of the named plaintiffs, APCC Services, Inc., is the for-profit subsidiary of a trade association, the American Public Communications Council. The parent trade association is not a (Cont'd)

Even if Aggregators were an "association," the Aggregators cannot meet the third *Hunt* requirement—"neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. As Qwest explained above, both proof of the claims as well as litigation of Qwest's affirmative defenses require evidence and testimony from each of the PSPs. *See* Part I *supra*. It is impossible to litigate these dial-around lawsuits without the full participation of the PSPs (although, of course, Aggregators will try nonetheless).

But singularly dispositive of the inapplicability of the third prong of *Hunt* is that the Aggregators seek monetary damages, which must be calculated individually for each of the PSPs. The Courts of Appeals have uniformly held that an association does not have standing to seek individualized monetary damages on behalf of its members. "[C]ourts . . . have consistently held that claims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test." *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Insurance Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990) (noting

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(Cont'd)

party to any of these lawsuits, and the for-profit subsidiary cannot cloak itself in its parent's dressings. The distinction between parent and subsidiary is highlighted by the other four named plaintiffs in *APCC v. Qwest*—four commercial entities that are not affiliated with the trade association and have no possible basis to claim to be associations. The plaintiff for-profit subsidiary is exactly like its other four co-plaintiffs.

that the plaintiff union "acknowledges that no federal court has allowed an association standing to seek monetary relief [unpaid wages] on behalf of its members," and denying associational standing to union); *Sanner v. Board of Trade of the City of Chicago*, 62 F.3d 918, 923 (7th Cir. 1995) ("We are not aware of any cases allowing associations to proceed on behalf of their members when claims for monetary, as opposed to prospective, relief are involved."); *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 284 (3d Cir. 2002); *Telecommunications Research & Action Ctr. v. Allnet Commc'n Servs., Inc.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986) *("TRAC")*.

Courts have held that individual participation of all members is required, even if the "individual calculation of damages for each [member] might be rather technical and uncomplicated" or "formulaic." *Sanner*, 62 F.3d at 923; *TRAC*, 806 F.2d at 1095. Here, calculation of the PSPs' claims is hardly "formulaic," but requires consideration of a myriad of facts unique to each PSP. This ends the inquiry under the third *Hunt* requirement.

CONCLUSION

For these reasons, Qwest respectfully submits that the Court should grant the Petition for a writ of *certiorari*.

Respectfully submitted,

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JOINT APPENDIX

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No. 07-552

Supreme Court, U.S.
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In The Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P. & AT&T CORP.,

Petitioners,

v.

APCC SERVICES, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 25, 2007
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RELEVANT DOCKET ENTRIES

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:01-cv-00642-ESH

APCC SERVICES, INC., et al

v.

SPRINT COMMUNICATION

Date Filed	#	Docket Text
03/23/2001	1	COMPLAINT filed by plaintiffs APCC SERVICES, INC., DATA NET SYSTEMS, JAROTH, INC., INTERA COMM CORP, and DAVEL COMM, INC; jury demand; attachments (5) (bm) (Entered: 03/27/2001)
07/06/2001	10	MOTION filed by defendant SPRINT COMMUNICATION to dismiss complaint [1-1], and/or to stay action pending referral to the Federal Communications Commission; exhibits (2 (jf) (Entered: 07/10/2001)
08/02/2001	13	AMENDED COMPLAINT by plaintiffs APCC SERVICES, INC., DATA NET SYSTEMS, JAROTH, INC., INTERA COMM CORP, and DAVEL COMM, INC amending complaint [1-1].; jury demand; Exhibits (5) (ag) (Entered: 08/03/2001)
08/02/2001	14	RESPONSE by plaintiffs in opposition to motion to dismiss complaint [1-1] [10-1] by SPRINT COMMUNICATION, motion to stay action

pending referral to the Federal Communications Commission [10-2] by SPRINT COMMUNICATION; Exhibits (15). (ag) (Entered: 08/03/2001)

08/17/2001 18 MOTION filed by defendant SPRINT COMMUNICATION to dismiss amended complaint complaint [13-1], and/or to stay this action pending referral to the federal communications commissions ; Exhibits (5) (ag) (Entered: 08/20/2001)

08/30/2001 19 RESPONSE by plaintiff APCC SERVICES, INC., plaintiff DATA NET SYSTEMS, plaintiff JAROTH, INC., plaintiff INTERA COMM CORP, plaintiff DAVEL COMM, INC in opposition to motion to dismiss amended complaint complaint [13-1] [18-1] by SPRINT COMMUNICATION, motion to stay this action pending referral to the federal communications commissions [18-2] by SPRINT COMMUNICATION; Exhibit (1). (tth) (Entered: 08/31/2001)

09/10/2001 21 REPLY MEMORANDUM by defendant SPRINT COMMUNICATION in support of it's motion to dismiss amended complaint complaint [13-1] [18-1] by SPRINT COMMUNICATION, motion to stay this action pending referral to the federal communications commissions [18-2]

by SPRINT COMMUNICATION (cas) (Entered: 09/12/2001)

12/21/2001 23 ORDER by Judge Ellen S. Huvelle : denying motion to dismiss amended complaint complaint [13-1] [18-1] by SPRINT COMMUNICATION, denying motion to stay this action pending referral to the federal communications commissions [18-2] by SPRINT COMMUNICATION, denying motion to dismiss complaint [1-1] [10-1] by SPRINT COMMUNICATION, denying motion to stay action pending referral to the Federal Communications Commission [10-2] by SPRINT COMMUNICATION; that any response to plaintiffs' motion to appoint a special master must be filed by 1/15/02; Status hearing set for 2:00 p.m. on 2/8/02; (N) (gdf) (Entered: 12/21/2001)

01/18/2002 27 ANSWER TO AMENDED COMPLAINT [13-1] and COUNTERCLAIM by defendant SPRINT COMMUNICATION against plaintiffs. (nmr) (Entered: 01/22/2002)

07/07/2003 38 CROSS MOTIONS by defendant SPRINT COMMUNICATION to dismiss amended complaint [13-1] for lack of subject matter jurisdiction (nmr) (Entered: 07/08/2003)

07/25/2003	42	RESPONSE by plaintiff in opposition to cross motion to dismiss amended complaint [13-1] for lack of subject matter jurisdiction [38-1] by SPRINT COMMUNICATION. (nmr) (Entered: 07/28/2003)
07/25/2003	43	REPLY by plaintiffs in support of motion to amend first amended complaint [13-1] by DAVEL COMM, INC, INTERA COMM CORP, JAROTH, INC., DATA NET SYSTEMS, APCC SERVICES, INC. [34-1] by DAVEL COMM, INC, INTERA COMM CORP, JAROTH, INC., DATA NET SYSTEMS, APCC SERVICES, INC. (nmr) (Entered: 07/28/2003)
08/01/2003	44	REPLY by defendant SPRINT COMMUNICATION in support of cross motion to dismiss amended complaint [13-1] for lack of subject matter jurisdiction [38-1] (jf) (Entered: 08/05/2003)
09/04/2003	45	ORDER by Judge Ellen S. Huvelle : denying cross motion to dismiss amended complaint [13-1] for lack of subject matter jurisdiction [38-1] by SPRINT COMMUNICATION, granting in part, denying in part motion to amend first amended complaint [13-1] by DAVEL COMM, INC, INTERA COMM CORP,

JAROTH, INC., DATA NET SYSTEMS, APCC SERVICES, INC. [34-1] ; granting with respect to additional grounds for relief and denying as moot with respect to joinder of plaintiffs. (N) (mon) (Entered: 09/04/2003)

09/22/2003 46 MOTION filed by defendant SPRINT COMMUNICATION to dismiss second amended complaint [13-1] for lack of subject matter juridiction and/or failure to state a claim ; exhibits (1) (jf) (Entered: 09/24/2003)

10/17/2003 52 SUPPLEMENTAL MEMORANDUM of Sprint's motion to dismiss plaintiffs' second amended complaint. (jf,) (Entered: 12/10/2003)

10/23/2003 49 Memorandum in opposition to motion to dismiss plaintiffs' second amended complaint 46 filed by APCC SERVICES, INC., DATA NET SYSTEMS, LLC, DAVEL COMMUNICATIONS, INC., INTERA COMMUNICATIONS CORPORATION, JAROTH, INC.. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Text of Proposed Order) (jf,) (Entered: 10/26/2003)

12/17/2003 53 ORDER denying 46 Motion to Dismiss and granting defendant's alternative request for certification

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12/17/2003	54	MEMORANDUM AND OPINION. Signed by Judge Ellen S. Huvelle on 12/17/03. (BL,) (Entered: 12/17/2003)
03/08/2004	55	NOTICE OF APPEAL as to 45 Order dated 09/03/03 53 Order on Motion to Dismiss dated 12/17/03 by SPRINT COMMUNICATIONS COMPANY. Filing fee $ 255, receipt number 122055. (jf,) (Entered: 03/26/2004)

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:99-cv-00696-ESH

APCC SERVICES INC, et al
v.
AT&T CORPORATION

Date Filed	#	Docket Text
03/19/1999	1	COMPLAINT filed by plaintiff APCC SERVICES INC, plaintiff DATA NET SYSTEMS LLC, plaintiff JAROTH INC, plaintiff NSC TELEMANAGEMENT, plaintiff DAVEL COMMUNICATIONS, plaintiff PEOPLES TELEPHONE CO; jury demand; Exhibits (5) (tth) (Entered: 03/24/1999)
09/30/1999	9	AMENDED COMPLAINT by plaintiffs [1-1]; Exhibits (5); jury demand (tth) (Entered: 10/05/1999)
10/28/1999	14	MOTION filed by defendant AT&T CORPORATION to dismiss complaint [1-1], or, alternatively, to stay pending referral to the Federal Communications Commission; Exhibits (4) (tth) (Entered: 10/29/1999)
12/17/1999	19	RESPONSE by plaintiff APCC SERVICES INC, plaintiff DATA NET SYSTEMS LLC, plaintiff JAROTH INC, plaintiff NSC TELEMANAGEMENT, plaintiff DAVEL COMMUNICATIONS to

motion to dismiss complaint [1-1] [14-1] by AT&T CORPORATION, motion to stay pending referral to the Federal Communications Commission [14-2] by AT&T CORPORATION (tb) (Entered: 12/20/1999)

01/24/2000 20 REPLY by defendant AT&T CORPORATION in support of motion to dismiss complaint [1-1] [14-1] by AT&T CORPORATION, motion to stay pending referral to the Federal Communications Commission [14-2] by AT&T CORPORATION (tb) (Entered: 01/27/2000)

03/09/2000 21 ORDER by Judge Ellen S. Huvelle : denying motion to dismiss complaint [1-1] [14-1] by AT&T CORPORATION, denying motion to stay pending referral to the Federal Communications Commission [14-2] by AT&T CORPORATION status hearing set for 11:30 4/14/00 ; (N) (gdf) (Entered: 03/09/2000)

03/23/2000 23 ANSWER TO COMPLAINT [1-1] [9-1] and COUNTERCLAIM by defendant AT&T CORPORATION against plaintiff APCC SERVICES INC, plaintiff DATA NET SYSTEMS LLC, plaintiff JAROTH INC, plaintiff NSC TELEMANAGEMENT, plaintiff DAVEL COMMUNICATIONS, plaintiff PEOPLES

TELEPHONE CO (tb) (Entered: 03/24/2000)

04/17/2000 25 AMENDED ANSWER TO COMPLAINT [1-1] and COUNTERCLAIM by defendant AT&T CORPORATION against plaintiff APCC SERVICES INC, plaintiff DATA NET SYSTEMS LLC, plaintiff JAROTH INC, plaintiff NSC TELEMANAGEMENT, plaintiff DAVEL COMMUNICATIONS, plaintiff PEOPLES TELEPHONE CO (bjsp) (Entered: 04/19/2000)

05/04/2000 26 REPLY by plaintiffs to answer and counter- claim [23-1] by dendant counterclaim AT&T [23-2] by counter-claimant by defendant (bjsp) (Entered: 05/05/2000)

08/22/2001 49 JOINT MOTION by plaintiffs APCC SERVICES INC, DATA NET SYSTEMS LLC, JAROTH INC, NSC TELEMANAGEMENT, DAVEL COMMUNICATIONS, PEOPLES TELEPHONE CO, and defendant AT&T CORPORATION to consolidate cases , and to amend discovery schedule (tth) (Entered: 08/23/2001)

01/08/2003 58 MOTION filed by defendant AT&T CORPORATION in 1:99-cv-00696 to dismiss assignee plaintiffs' claims

[9-1] ; Exhibits (6) (nmr) (Entered: 01/09/2003)

02/11/2003 63 MEMORANDUM by plaintiffs APCC SERVICES INC in 1:99-cv-00696, DATA NET SYSTEMS LLC in 1:99-cv-00696, JAROTH INC in 1:99-cv-00696, NSC TELEMANAGEMENT in 1:99-cv-00696, DAVEL COMMUNICATIONS 1:99-cv-00696 in opposition to motion to dismiss assignee plaintiffs' claims [9-1] [58-1] by AT&T CORPORATION; Exhibits (10) (nmr) (Entered: 02/12/2003)

03/14/2003 68 REPLY by defendant AT&T CORPORATION in 1:99-cv-00696 in support of motion to dismiss assignee plaintiffs' claims [9-1] [58-1] by AT&T CORPORATION; Exhibits (5) (nmr) (Entered: 03/17/2003)

03/28/2003 69 MEMORANDUM OPINION by Judge Ellen S. Huvelle (N) (kk) (Entered: 03/28/2003)

03/28/2003 70 ORDER by Judge Ellen S. Huvelle : granting motion by defendant AT&T CORPORATION to dismiss assignee plaintiffs' claims [9-1] [58-1]; dismissing plaintiffs' complaint with prejudice (with the exception of the complaint filed by PEOPLES TELEPHONE CO., INC.) (N) (kk)

Modified on 03/28/2003 (Entered: 03/28/2003)

05/23/2003 71 MOTION filed by plaintiffs APCC SERVICES INC, DATA NET SYSTEMS LLC, JAROTH INC, NSC TELEMANAGEMENT, DAVEL COMMUNICATIONS, PEOPLES TELEPHONE CO in 1:99-cv-00696 for reconsideration of order dismissing plaintiffs' complaint with prejudice (with the exception of the complaint filed by PEOPLES TELEPHONE CO., INC.) [70-1], order [70-2] ; Exhibits (2) (nmr) (Entered: 05/28/2003)

05/23/2003 72 MOTION filed by plaintiffs APCC SERVICES INC, DATA NET SYSTEMS LLC, JAROTH INC, NSC TELEMANAGEMENT, DAVEL COMMUNICATIONS in 1:99-cv-00696 in the alternative to their motion for reconsideration, to amend amended complaint [9-1] to substitute in several independant payphone service providers to act as class representatives ; Exhibits (3) (nmr) (Entered: 05/28/2003)

05/23/2003 73 MOTION filed by plaintiff PEOPLES TELEPHONE CO in 1:99-cv-00696 in the alternative to a) the motion to reconsider and b) the dismissed aggregator's motion for leave to

amend, to amend amended complaint [9-1] to add several independant payphone service providers to act together with this plaintiff as class representatives ; Exhibits (2) (nmr) (Entered: 05/28/2003)

06/24/2003 76 MEMORANDUM by defendant AT&T CORPORATION in 1:99-cv-00696 in opposition to motion in the alternative to a) the motion to reconsider and b) the dismissed aggregator's motion for leave to amend, to amend amended complaint [9-1] to add several independant payphone service providers to act together with this plaintiff as class representatives [73-1] by PEOPLES TELEPHONE CO (nmr) (Entered: 06/25/2003)

06/24/2003 77 MEMORANDUM by defendant AT&T CORPORATION in 1:99-cv-00696 in opposition to motion for reconsideration of order dismissing plaintiffs' complaint with prejudice (with the exception of the complaint filed by PEOPLES TELEPHONE CO., INC.) [70-1], order [70-2] [71-1] by Aggregators, motion in the alternative to their motion for reconsideration, to amend amended complaint [9-1] to substitute in several payphone service providers to act as class representatives [72-1] by

DAVEL COMMUNICATIONS, NSC TELEMANAGEMENT, JAROTH INC, DATA NET SYSTEMS LLC, APCC SERVICES INC; Declaration (1); Exhibits (29); EXHIBITS (4) FILED UNDER SEAL (nmr) Modified on 06/25/2003 (Entered: 06/25/2003)

06/26/2003 79 RESPONSE by defendant AT&T CORPORATION in 1:99-cv-00696 in opposition to motion in the alternative to a) the motion to reconsider and b) the dismissed aggregator's motion for leave to amend, to amend amended complaint [9-1] to add several independant payphone service providers to act together with this plaintiff as class representatives [73-1] by PEOPLES TELEPHONE CO. (mpt) (Entered: 06/27/2003)

07/07/2003 80 REPLY by plaintiff PEOPLES TELEPHONE CO in 1:99-cv-00696 in support of motion in the alternative to a) the motion to reconsider and b) the dismissed aggregator's motion for leave to amend, to amend amended complaint [9-1] to add several independant payphone service providers to act together with this plaintiff as class representatives [73-1] by PEOPLES TELEPHONE CO (nmr) (Entered: 07/08/2003)

07/07/2003	81	REPLY by plaintiffs APCC SERVICES INC, DATA NET SYSTEMS LLC, JAROTH INC, NSC TELEMANAGEMENT, DAVEL COMMUNICATIONS in 1:99-cv-00696 in support of motion for reconsideration of order dismissing plaintiffs' complaint with prejudice (with the exception of the complaint filed by PEOPLES TELEPHONE CO., INC.) [70-1], order [70-2] [71-1] by plaintiffs; Exhibit (1) (nmr) (Entered: 07/08/2003)
09/04/2003	82	MEMORANDUM OPINION by Judge Ellen S. Huvelle (N) (mon) (Entered: 09/04/2003)
09/04/2003	83	ORDER by Judge Ellen S. Huvelle : granting motion to seal Exhibits D, E, F, and G to the declaration of Colleen M. Coyle in support of its combined opposition to Aggregators' Motion to Reconsider and Aggregators' Motion to Amend the Complaint [78-1] by AT&T CORPORATION, finding motion in the alternative to a) the motion to reconsider and b) the dismissed aggregator's motion for leave to amend, to amend amended complaint [9-1] to add several independant payphone service providers to act together with this plaintiff as class representatives by PEOPLES TELEPHONE CO [73-1] moot, finding motion in

the alternative to their motion for reconsideration, to amend amended complaint [9-1] to substitute in several independant payphone service providers to act as class representatives by DAVEL COMMUNICATIONS, NSC TELEMANAGEMENT, JAROTH INC, DATA NET SYSTEMS LLC, APCC SERVICES INC [72-1] moot, granting motion for reconsideration of order dismissing plaintiffs' complaint with prejudice (with the exception of the complaint filed by PEOPLES TELEPHONE CO., INC.) [70-1], order [70-2] [71-1] by counter-defendant by plaintiff, counter-defendant, plaintiff, counter-defendant, plaintiff, counter-defendant, plaintiff, counter-defendant, plaintiff, counter-defendant, plaintiff (N) (mon) (Entered: 09/04/2003)

10/20/2003 84 MOTION filed by defendant AT&T CORPORATION in 1:99-cv-00696 for reconsideration of order [83-1] filed on 09/04/03, or, in the alternative, for certification of an interlocutory appeal ; exhibits (1) (jf) (Entered: 10/21/2003)

11/17/2003 86 Memorandum in opposition to motion re 84 filed by APCC SERVICES INC, DATA NET SYSTEMS, LLC, DAVEL COMMUNICATIONS GROUP, INC., JAROTH, INC., NSC

TELEMANAGEMENT CORPORATION, PEOPLES TELEPHONE COMPANY, INC.. (Attachments: # 1 Text of Proposed Order)Associated Cases: 1:99-cv-00696-ESH,1:01-cv-01531-ESH(Ward, Jeffrey) (Entered: 11/17/2003)

11/26/2003 87 REPLY in support of motion re 84 *for Reconsideration, or, in the Alternative, for Certification of an Interlocutory Appeal* filed by AT&T CORPORATION. (Attachments: # 1 Exhibit Cases# 2 Text of Proposed Order Proposed Order# 3 Text of Proposed Order Proposed Alternative Order)Associated Cases: 1:99-cv-00696-ESH, 1:01-cv-01531-ESH (Zatz, Clifford) (Entered: 11/26/2003)

12/17/2003 88 ORDER denying 84 Motion for Reconsideration, granting 84 certification of interlocutory appeal. Signed by Judge Ellen S. Huvelle on 12/17/03. Associated Cases: 1:99-cv-00696-ESH, 1:01-cv-01531-ESH(BL,) (Entered: 12/17/2003)

12/17/2003 89 MEMORANDUM AND OPINION. Signed by Judge Ellen S. Huvelle on 12/17/03. Associated Cases: 1:99-cv-00696-ESH,1:01-cv-01531-ESH(BL,) (Entered: 12/17/2003)

03/03/2004	91	ORDER of USCA consolidating USCA #04-8001 with USCA #04-8002 and granting the petitions for permission to appeal as to 90 Notice of Appeal filed by AT&T CORPORATION (cp,) (Entered: 05/18/2004)
03/08/2004	90	NOTICE OF APPEAL as to 83 Order dated 09/03/03 and 88 Order on Motion for Reconsideration, Order on Motion for Miscellaneous Relief dated 12/17/03 by AT&T CORPORATION. Filing fee $ 255, receipt number 121978. (jf,) (Entered: 03/26/2004)
09/14/2007	99	CONSOLIDATED AMENDED COMPLAINT against AT&T CORPORATION filed by APCC SERVICES INC, DATA NET SYSTEMS, LLC, JAROTH, INC., NSC TELEMANAGEMENT CORPORATION, DAVEL COMMUNICATIONS GROUP, INC., PEOPLES TELEPHONE COMPANY, INC.. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E) (nmw,) (Entered: 09/17/2007)
09/24/2007	100	ANSWER to Amended Complaint with Jury Demand by AT&T CORPORATION. Related document: 99 Amended Complaint, filed by DAVEL COMMUNICATIONS GROUP, INC., PEOPLES TELEPHONE COMPANY, INC., DATA NET SYSTEMS, LLC,

JAROTH, INC., NSC TELEMANAGEMENT CORPORATION, APCC SERVICES INC.(Zimmerman, Tobias) (Entered: 09/24/2007)

09/24/2007 101 MOTION for Leave to File *Amended Counterclaims* by AT&T CORPORATION (Zimmerman, Tobias) (Entered: 09/24/2007)

09/25/2007 104 Amended COUNTERCLAIM against DATA NET SYSTEMS, LLC, JAROTH, INC., NSC TELEMANAGEMENT CORPORATION, DAVEL COMMUNICATIONS GROUP, INC., PEOPLES TELEPHONE COMPANY, INC., APCC SERVICES INC filed by AT&T CORPORATION.(lc,) (Entered: 10/09/2007)

01/10/2008 111 MOTION to Stay *Proceedings Pending Supreme Court Decision* by AT&T CORPORATION (Attachments: # 1 Text of Proposed Order Proposed Order Granting Stay of Proceedings Pending Supreme Court Decision# 2 Exhibit Exhibit A – Letter Notice of Supreme Court Hearing# 3 Exhibit Exhibit B – Affidavit) (Zimmerman, Tobias) (Entered: 01/10/2008)

01/10/2008 112 MOTION to Amend/Correct *Consolidated Amended Complaint* by APCC SERVICES INC, DATA NET SYSTEMS, LLC, JAROTH, INC., NSC

TELEMANAGEMENT CORPORATION, DAVEL COMMUNICATIONS GROUP, INC., PEOPLES TELEPHONE COMPANY, INC. (Attachments: # 1 Second Consolidated Amended Complaint# 2 Exhibit A to Second Consolidated Amended Complaint# 3 Exhibit B to Second Consolidated Amended Complaint# 4 Exhibit C to Second Consolidated Amended Complaint# 5 Exhibit D to Second Consolidated Amended Complaint# 6 Exhibit E to Second Consolidated Amended Complaint# 7 Exhibit 2# 8 Proposed Order) (Ward, Jeffrey) (Entered: 01/10/2008)

01/17/2008 114 Memorandum in opposition to re 112 MOTION to Amend/Correct *Consolidated Amended Complaint Opposition Memorandum* filed by AT&T CORPORATION. (Attachments: # 1 Exhibit Exhibit A – Petition for certiorari, # 2 Exhibit Ex. B – Respondents' Opposition to Petition, # 3 Exhibit Ex. C – Letter APCC to PSPs)(Zimmerman, Tobias) (Entered: 01/17/2008)

01/17/2008 115 Memorandum in opposition to re 111 MOTION to Stay *Proceedings Pending Supreme Court Decision* filed by APCC SERVICES INC, DATA NET SYSTEMS, LLC, JAROTH, INC., NSC TELEMANAGEMENT

CORPORATION, DAVEL COMMUNICATIONS GROUP, INC., PEOPLES TELEPHONE COMPANY, INC.. (Attachments: # 1 Text of Proposed Order)(Ward, Jeffrey) (Entered: 01/17/2008)

01/24/2008 116 REPLY to opposition to motion re 111 MOTION to Stay *Proceedings Pending Supreme Court Decision* filed by AT&T CORPORATION. (Zimmerman, Tobias) (Entered: 01/24/2008)

01/24/2008 117 REPLY to opposition to motion re 112 MOTION to Amend/Correct *Consolidated Amended Complaint* filed by APCC SERVICES INC, DATA NET SYSTEMS, LLC, JAROTH, INC., NSC TELEMANAGEMENT CORPORATION, DAVEL COMMUNICATIONS GROUP, INC., PEOPLES TELEPHONE COMPANY, INC.. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit)(Ward, Jeffrey) (Entered: 01/24/2008)

01/29/2008 MINUTE ORDER: For the reasons stated in open court, AT&T Corp., Qwest Communications Corp. and Sprint Communications Company, L.P.'s Motion to Stay Proceedings Pending Decision by the Supreme Court and for Expedited Consideration of Same 111 is granted on the

conditions agreed to by the parties, and the Clerk's Office shall administratively close these cases pending the decision of the Supreme Court in Sprint Communications Company, L.P., et al. v. APCC Services, et al., No. 07-552. The Court also denies without prejudice plaintiffs' motions for leave to amend [51, 76, 112]. Signed by Judge Ellen S. Huvelle on 1/29/2008. (VT) (Entered: 01/29/2008)

U.S. Court of Appeals for the D.C. Circuit

Court of Appeals Docket #: 04-7035

04-7035 APCC Svc Inc, et al v. AT&T Corp

3/25/04 CIVIL-PRIVATE CASE docketed. Notice of Appeal filed by Appellant AT&T Corp [813133-1]. Interlocutory appeal allowed pursuant to order filed 3/1/04 which granted petition for permission to appeal under 28 U.S.C. 1292 (b) in case No. 04-8001. (sha) [04-7035]

3/31/04 CLERK'S ORDER filed [813140] to consolidate cases [813140-1]. [Entry Date: 3/31/04] [04-7034, 04-7035] (sha) [04-7034 04-7035]

6/28/05 JUDGMENT that the orders of the district court denying the IXC's motion to dismiss be reversed for the reasons in the accompanying opinion. Before Judges Ginsburg, Sentelle, Randolph. [Entry Date: 6/28/05] [04-7034, 04-7035] [VACATED PER COURT ORDER ON 4/26/07] (mcm) [04-7034 04-7035]

6/28/05 OPINION filed [902806] (21 pgs) for the Court PER CURIAM, DISSENTING OPINION (6 pgs) filed by Judge Sentelle, DISSENTING IN PART OPINION (5 pgs) filed by Judge Ginsburg [04-7034, 04-7035] (mcm) [04-7034 04-7035]

11/10/05 PER CURIAM ORDER, In Banc, filed [931581] denying suggestion rehearing en banc [910351-2] filed by APCC Svc Inc in 04-7034, 04-7035. Before Judges Ginsburg,*

Sentelle, Henderson,** Randolph, Rogers, Tatel, Garland, Brown,* Griffith.* [Filed 11/10/05] [04-7034, 04-7035] (Chief Judge Ginsburg and Circuit Judges Brown and Griffith would grant the petition for rehearing en banc) (Circuit Judge Henderson did not participate in this matter) (mcm) [04-7034 04-7035]

11/10/05 PER CURIAM ORDER filed [931584] denying petition rehearing [910351-1] filed by APCC Svc Inc. (Mandate may issue on or after 11/18/05 in 04-7034, in 04-7035). Before Judges Ginsburg,* Sentelle, Randolph. (Chief Judge Ginsburg would grant the petition for rehearing) [Entry Date: 11/10/05] [04-7034, 04-7035] (mcm) [04-7034 04-7035]

12/15/05 LETTER dated 12/14/05 received from S.Ct. advising that the petition for a writ of certiorari was filed on 12/12/05 and placed on the docket 12/14/05 as No. 05-766 [942447-1]. [04-7034, 04-7035] (krm) [04-7034 04-7035]

4/26/07 NOTICE filed by the Supreme Court. The petition for writ of certiroari is granted. The judgement is vacated and the case is remanded to the US Court of Appeals for the DC Circuit, for further consideration in light of Global Crossing Telecommunication, Inc. v. Metrophones Telecommunications, Inc. 550 U.S. ___ (2007). The judgement or mandate of the Supreme Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed

timely, the judgement or mandate will be further stayed pending the Supreme Court's action on the petition for rehearing. [04-7034, 04-7035] (smc) [04-7034 04-7035]

6/8/07 JUDGMENT that the orders of the district court denying the motions to dismiss are affirmed and the case is remanded for further proceedings for the reasons in the accompanying opinion. Before Judges Ginsburg, Sentelle, Randolph. [Entry Date: 6/8/07] [04-7034, 04-7035] (mcm) [04-7034 04-7035]

6/8/07 OPINION filed [1045927] (3 pgs) for the Court PER CURIAM [04-7034, 04-7035] (mcm) [04-7034 04-7035]

7/9/07 PETITION filed Copies: 19 by Appellant Sprint Comm Co in 04-7034, Appellant AT&T Corp in 04-7035 (certificate of mail service dated 7/9/07) for rehearing [1052447-1] or for rehearing en banc [1052447-2]. [04-7034, 04-7035] (smc) [04-7034 04-7035]

8/7/07 PER CURIAM ORDER, In Banc, filed [1058855] denying petition rehearing en banc [1052447-2] filed by Sprint Comm Co, AT&T Corp in 04-7034, 04-7035. Before Judges Ginsburg, Sentelle, Henderson,* Randolph, Rogers, Tatel, Garland, Brown, Griffith, Kavanaugh. (Circuit Judge Henderson did not participate in this matter) [Entry Date: 8/7/07] 04-7035] (mcm) [04-7034 04-7035]

8/29/07 PER CURIAM ORDER filed [1063689] denying motion stay mandate [1061451-1] filed by Sprint Comm Co. (Mandate to issue on 9/5/07 in 04-7034, in 04-7035 under FRAP 41(b)). Before Judges Ginsburg, Sentelle, Randolph. [Entry Date: 8/29/07] [04-7034, 04-7035] (mcm) [04-7034 04-7035]

9/17/07 MANDATE ISSUED to Clerk, District Court [1067371-1] [04-7034, 04-7035] (mcm) [04-7034 04-7035]

1/11/08 LETTER filed by Clerk of the Supreme Court [1091549-1]. The petition for a writ of certiorari is granted. A Briefing order was issued in this case. Certificate of service date 1/4/08. [04-7034, 04-7035] (lmf) [04-7034 04-7035]

2/5/08 Letter sent transmitting certified copy of dockets and original record to US Supreme Court [04-7034, 04-7035] (mam) [04-7034 04-7035]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit A, 10306 Eaton Place, Suite 520 Fairfax, VA 22030,

DATA NET SYSTEMS, L.L.C., as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit B, 1608 Barclay Boulevard Buffalo Grove, IL 60089,

JAROTH, INC. d/b/a PACIFIC TELEMANAGEMENT SERVICES, as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit C, 14472 Wickes Boulevard San Leandro, California 94577

NSC TELEMANAGEMENT CORPORATION, as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit D, 6920 Koll Center Parkway, Suite 211 Pleasanton, CA 94566

Case No. 1:99CV00696

FIRST AMENDED COMPLAINT

DAVEL COMMUNICATIONS GROUP, INC., as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit E, 10120 Windhorst Road Tampa, FL 33619, and

PEOPLES TELEPHONE COMPANY, INC., 10120 Windhorst Road, Tampa, FL 33619

Plaintiffs,

v.

AT&T CORPORATION, 32 Avenue of the Americas, New York, NY 10013,

Defendant.

Plaintiffs bring this First Amended Complaint ("Complaint") against Defendant AT&T Corporation ("AT&T") to collect compensation owed by AT&T under federal law and for other relief, including an order directing AT&T to comply with federal law, accountings of the sums owed by AT&T, interest, costs, and attorneys' fees as provided by law. Plaintiffs state as follows:

Summary of Complaint

1. This action is brought by Plaintiffs on behalf of hundreds of entities that own and operate over 400,000 public payphones located throughout the

United States. The Plaintiffs, known in the telecommunications industry as independent payphone service providers, bring this action to collect compensation that Defendant AT&T currently owes the Plaintiff independent payphone service providers for completed access code and toll free calls that have been made since October 7, 1997 using one of Plaintiffs' payphones and carried over AT&T's telephone network facilities. AT&T is required to pay to the Plaintiff independent payphone service providers compensation for each such call, as prescribed by the Federal Communications Commission ("Commission" or "FCC"), under the rules, regulations, and orders issued by the FCC pursuant to Section 276 of the Communications Act of 1934, as amended ("Act"). 47 U.S.C. § 276. AT&T is violating the orders of the FCC governing the method for determining the number of calls for which AT&T's payment is due to the Plaintiff independent payphone service providers and is failing to compensate the Plaintiff independent payphone service providers for each and every completed access code and toll free call using Plaintiffs' payphones and carried over AT&T's telephone network facilities. Defendant AT&T is also in breach of its contractual obligations to compensate Plaintiff Peoples Telephone Company, Inc. for the actual AT&T access code and toll free calls, which use the payphones covered by the contract, at the prevailing mandated FCC per-call compensation rate.

The Parties

2. Plaintiff APCC Services, Inc. ("APCCS") is a Virginia corporation with its principal place of business in Fairfax, Virginia. APCCS is the duly authorized billing and collection agent, assignee of the claims of, and attorney-in-fact for several hundred independent payphone service providers for purposes of collecting compensation from Defendant AT&T and other carriers. A list of names and addresses of the independent payphone service providers on whose behalf APCCS brings this action is appended as Exhibit A to this Complaint.

3. Plaintiff Data Net Systems, L.L.C. ("Data Net Systems") is an Illinois limited liability company with its principal place of business in Buffalo Grove, Illinois. Data Net Systems is the duly authorized billing and collection agent, assignee of the claims of, and attorney-in-fact for 96 independent payphone service providers for purposes of collecting compensation from Defendant AT&T and other carriers. A list of the names and addresses of the independent payphone service providers on whose behalf Data Net Systems brings this action is appended as Exhibit B to this Complaint.

4. Plaintiff Jaroth, Inc. d/b/a Pacific Telemanagement Services ("Pacific") is a California corporation with its principal place of business in San Leandro, California. Pacific is the duly authorized billing and collection agent, assignee of the claims of, and attorney-in-fact for three independent payphone

service providers for purposes of collecting compensation from Defendant AT&T and other carriers. A list of the names and addresses of the independent payphone service providers on whose behalf Pacific brings this action is appended as Exhibit C to this Complaint.

5. Plaintiff NSC Telemanagement Corporation ("NSC") is a Delaware corporation with its principal place of business in Pleasanton, California. NSC is the duly authorized billing and collection agent, assignee of the claims of, and attorney-in-fact for 13 independent payphone service providers for purposes of collecting compensation from Defendant AT&T and other carriers. A list of the names and addresses of the independent payphone service providers on whose behalf NSC brings this action is appended as Exhibit D to this Complaint.

6. Plaintiff Davel Communications Group, Inc. ("Davel") is an Illinois corporation with its principal place of business in Tampa, Florida. Davel is the duly authorized billing and collection agent, assignee of the claims of, and attorney-in-fact for two independent payphone service providers for purposes of collecting compensation from Defendant AT&T and other carriers. A list of the names and addresses of the independent payphone service providers on whose behalf Davel brings this action is appended as Exhibit E to this Complaint.

7. Plaintiff Peoples Telephone Company, Inc. ("Peoples") is a New York Corporation with its principal

place of business in Tampa, Florida. Peoples is a payphone service provider which provides pay telephone services to callers from 43,000 payphones located throughout the United States. Peoples brings this action on behalf of itself against Defendant AT&T.

8. The named parties in paragraphs 2 through 7 of this Complaint hereinafter are referred to collectively as "Plaintiffs".

9. Defendant AT&T Corporation is a New York corporation with its principal place of business in New York, New York. AT&T resides, is found, and does business in the District of Columbia.

10. Defendant AT&T is a common carrier of telephone calls and is subject to the compensation payment obligations mandated by Section 276 of the Communication Act of 1934, as amended, 47 U.S.C. § 276, and the related rules, regulations, and orders of the FCC.

Jurisdiction and Venue

11. This action arises under Sections 206 and 207 of the Act, 47 U.S.C. §§ 206 and 207, and the rules, regulations, and orders promulgated or issued by the FCC by authority of the Act.

12. This Court has jurisdiction over the subject matter of this action pursuant to 47 U.S.C. § 207 and 28 U.S.C. § 1331.

13. Venue in this District is proper pursuant to 28 U.S.C. § 1391 in that Defendant AT&T resides in this District.

The Payphone Industry and Long-Distance Calling Services

14. Independent payphone service providers own, install, operate, manage, or maintain payphone services and facilities at various locations around the country, which enable callers to access the telephone network when away from their home or office. Plaintiff independent payphone service providers recover the cost of their payphone services and facilities by receiving payment for the use of those payphones either from callers or from carriers. Plaintiff independent payphone service providers compete with each other and with the payphones owned and operated by local telephone companies.

15. Carriers, such as Defendant AT&T, provide numerous and varied telephone service offerings, many of which can be used from payphones. The FCC has determined that carriers' access code and toll free calls constitute approximately one-third of the use of a payphone's services and facilities.

16. Carrier services using access codes enable a caller to use the telephone network and to pay for the call by means other than by paying for the call at the originating telephone. Typical billing arrangements include, but are not limited to, the use of calling cards, credit cards, prepaid cards, collect calls, and

third-party calls. These services, such as "1-800-CALL ATT" and "10-10-288", are frequently used by callers when away from their home or office telephones. From a payphone, the access code allows the caller to reach the carrier's network to place a call without making any payment to the payphone service provider. The carrier receives the payment for the call according to the particular payment method selected by the caller.

17. Toll free services are sold by carriers to subscribers that desire to generate calls to the subscriber without any telephone charges to the originating caller. Also referred to as "subscriber 800" calls, such as "1-800-FLOWERS", subscribers use these services to encourage calls by customers or other parties interested in the subscriber. These services were commonly known by the "800" dialing prefix originally associated with them. Today, the popularity of these services has resulted in continued expansion such that toll-free numbers now include the "888" and "877" prefixes. Similar to access code calls, a caller using a payphone for a toll free call reaches the carrier's network without making any payment to the payphone service provider. Carriers are paid by the subscriber for calls placed to that subscriber's toll free number.

Statutory and Regulatory Background

18. In February, 1996, the Telecommunications Act of 1996 became law and, in relevant part, directed

the FCC to prescribe regulations that "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation". 47 U.S.C. § 276(b)(1)(A).

19. Pursuant to the Act, the FCC has promulgated rules and regulations and has issued orders which require carriers, including Defendant AT&T, to pay compensation to independent payphone service providers for each and every compensable call. A compensable call is a completed call made from a payphone for which the payphone owner cannot receive compensation from another source. Access code calls and toll free calls are two types of such calls.

20. Pursuant to the Act, the FCC has promulgated rules and regulations and has issued orders establishing the per-call rate for all compensable calls. For all compensable calls made on or after October 7, 1997, the FCC initially set a rate of $.284 per call. The FCC subsequently issued a report and order effective April 21, 1999 changing the going forward rate to $.24 per call, which rate is to remain in effect until January 31, 2002. This report and order also provided for a retroactive adjustment of the rate to $.238 per call for the period of October 7, 1997 to April 20, 1999, with the adjustment to be applied in a later proceeding. However, Defendant AT&T

remained obligated to pay compensation to the Plaintiffs at the $.284 rate until such time as the $.24 rate became effective.

21. By regulation, the FCC requires each carrier, including Defendant AT&T, to which a compensable call from a payphone is routed, to track or arrange for the tracking of each such call so that it may accurately compute the compensation it is required to pay to each payphone service provider. 47 CFR § 64.1310(a). Each carrier may use the tracking method of its choice.

22. The FCC regulations also provide that carriers and independent payphone service providers shall establish arrangements for the billing and collection of compensation for such completed calls. 47 CFR § 64.1310(b).

23. By order, the FCC requires each carrier to make payment of the compensation due independent payphone service providers at least on a quarterly basis.

24. Further, the FCC requires that a carrier which fails to make its compensation payment by the required due date should pay interest at the simple interest rate of 11.25% per year, accruing on its unpaid obligations from the date due until paid.

Billing and Payment Procedures

25. Under FCC-approved procedures adopted by the telecommunications industry, independent payphone

service providers (such as Plaintiff Peoples) or the billing and collection agents for groups of independent payphone service providers (such as Plaintiffs APCCS, Data Net Systems, Pacific, NSC, and Davel) provide to carriers (such as Defendant AT&T) on a calendar quarter basis a list of the telephone numbers of the payphones owned and operated by the independent payphone service provider or group of independent payphone service providers. The telephone number of a payphone also is referred to in the telecommunications industry as an "ANI", short for "Automatic Number Identification". The ANI is used by the carrier to identify the payphone from which a call originates.

26. Under these billing and payment procedures, the list of payphone telephone numbers, or ANIs, for which compensation is sought is then matched by the carrier to its records of compensable calls made during the calendar quarter. The carrier is required to remit payment for all of its compensable calls to the respective independent payphone service provider, or to the billing and collection agent for a group of independent payphone service providers, by the beginning of the next calendar quarter after the carrier receives the list of ANIs.

27. In addition to using the ANIs in the billing process, the ANI is part of the data which precedes the transmission of the call in the network. The ANI may be used either while the call is taking place or afterwards to identify a compensable call. Attached to each electronically transmitted ANI is a two digit

code, commonly referred to as ANI information digits, or ANI ii digits. The ANI information digits convey certain information about the telephone line on which a call is originating. For example, the digits "07" mean generally that the call is originating from a restricted telephone line. The sophisticated equipment used in a telephone network often can "read" these ANI information digits, and may use them to switch and route calls, for example, to an operator station for special handling.

28. With the advent of the payphone compensation requirements, the FCC required that, to be eligible for compensation, Plaintiff independent payphone service providers and local exchange companies must make available payphone specific ANI information digits, which for the payphones involved here are generally the digits "70." To make this possible, local exchange companies, such as Bell Atlantic, that provide telephone service to independent payphone service providers are required to implement a software capability at the local exchange company's switch, known as Flex ANI, on the Plaintiff independent payphone service providers' payphone lines. Flex ANI makes it possible to provide the payphone specific coding digits "70", so carriers, such as AT&T, could use the equipment in their network(s) to specifically identify that the call is coming from a payphone for the purpose of tracking the call as a compensable call.

29. The FCC requires carriers, such as AT&T, that wish to use Flex ANI to request, test, and coordinate

with the local exchange companies to ensure there are no problems in providing or receiving the Flex ANI digits.

30. Due to various FCC waivers granted to local exchange companies, Flex ANI would be implemented over a period of time, but not later than December 31, 1998, and would become available at different payphones at different times. The FCC established special interim rules for determining compensation during the transition period involved in the implementation of Flex ANI.

31. For all of the Plaintiff independent payphone service providers' payphone lines on which Flex ANI is not available at least thirty days before the beginning of the calendar quarter during the interim period, AT&T must use only one of two alternative bases for calculating the number of compensable calls for all such payphone lines for that quarter:

a. AT&T could pay on the actual number of completed AT&T access code calls and toll free calls made on each payphone line, using whatever tracking capability it chose; or

b. because Bell Operating Company payphones already generally had the capability to generate payphone specific ANI information digits, AT&T could calculate the average number of completed AT&T access code and toll free calls from the Bell Operating Companies' payphones that are able to provide payphone specific coding digits for that quarter and use

that per payphone call average as the surrogate number of compensable calls for payment to independent payphone service providers.

32. Once Flex ANI is available on a Plaintiff independent payphone service provider's payphone line at least thirty days before the beginning of a calendar quarter, AT&T is required to pay the required rate of compensation for all completed AT&T access code calls and toll free calls based on the actual number of such calls from that payphone line.

33. For the payphone lines without Flex ANI, in any single quarter AT&T is prohibited from using a combination of the Bell Operating Companies' surrogate number for some calls, or some payphone lines, and the actual number of calls for other calls, or other payphone lines.

Plaintiffs' Billing of AT&T for Compensation

34. Pursuant to the FCC-approved procedures, Plaintiffs have submitted statements to Defendant AT&T for the payment of compensation for each calendar quarter from October 7, 1997 through December 31, 1997 ("4th Quarter 1997") through, and including, April 1, 1999 through June 30, 1999 ("2nd Quarter 1999"). Plaintiffs continue to submit statements to the Defendant AT&T for the payment of compensation for each calendar quarter as it becomes due.

COUNT I

35. Plaintiffs incorporate herein paragraphs 1 through 34 by reference.

36. For calls made on Plaintiff independent payphone service providers' payphones which lines did not have Flex ANI available on or before March 1, 1998, AT&T was required to make payments for the 4th Quarter 1997 through the 2nd Quarter 1998 by choosing, for each quarter, to use only one of the two FCC permitted methods for determining the number of compensable calls. On all payphone lines for each quarter, AT&T was required to use either:

a. the average number of compensable calls per payphone of the Bell Operating companies' payphones as a surrogate number; or

b. the actual number of compensable calls on each payphone line.

37. For calls made on Plaintiff independent payphone service providers' payphones which lines did not have Flex ANI available at least thirty (30) days before the beginning of the quarter, AT&T was required to make payments for the respective subsequent quarter by choosing to use only one of the same two FCC permitted methods for determining the number of compensable calls.

38. For one or more of the quarters beginning with the 4th Quarter 1997, AT&T violated the FCC's requirement for making payments to the Plaintiff independent payphone service providers by making

compensation payments based upon the Bell Operating Companies' surrogate number of completed AT&T toll free calls, while purportedly utilizing the actual number of calls for completed AT&T access code calls in the same quarter.

39. AT&T's mixed use of two separate and distinct methods in the same quarter for calculating the number of compensable calls on Plaintiff independent payphone service providers' payphones is in violation of the FCC's requirements.

40. As a result of AT&T's violation of the FCC's requirements, Plaintiff independent payphone service providers have been damaged through AT&T's failure to pay Plaintiff independent payphone service providers for the total number of compensable calls that AT&T is required to pay pursuant to the Act and the rules, regulations, and orders issued by the FCC.

41. Further, AT&T failed to make its compensation payments to the Plaintiff independent payphone service providers by the required due dates and owe Plaintiffs interest on the late payments.

42. Section 206 of the Act provides that in any case where a common carrier omits to do any act required of it, the common carrier "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which

attorney's fee shall be taxed and collected as part of the costs in the case." 47 U.S.C. § 206.

Prayer for Relief

WHEREFORE, Plaintiffs respectfully request that the Court:

a. Enter judgment in favor of Plaintiffs and against Defendant AT&T;

b. Order Defendant AT&T, at its own expense, to provide Plaintiffs an accounting prepared by an accounting firm of Plaintiffs' choice, of all compensable calls that AT&T has carried since October 7, 1997, from each and every payphone owned by a Plaintiff, or by an independent payphone service provider which has assigned its claim for such compensation to a Plaintiff and on whose behalf a Plaintiff acts as the billing and collection agent for compensation;

c. Award damages to each Plaintiff in an amount equal to $.284 due for each and every compensable call carried by Defendant AT&T from October 7, 1997 to April 20, 1999, and an amount equal to $.24 due for each and every compensable call carried by Defendant AT&T from April 21, 1999 to present, from each and every payphone owned by a Plaintiff, or by an independent payphone service provider which has assigned its claim for such compensation to a Plaintiff and on whose behalf a Plaintiff acts as the billing and collection agent for compensation, for

which AT&T has not yet paid Plaintiff independent payphone service providers;

d. In the alternative to the Prayer for Relief in subparagraphs (b) and (c) above, order Defendant AT&T Corporation to provide Plaintiffs with accountings setting forth the total number of completed AT&T access code calls and toll free calls on the Bell Operating Companies' payphones that provided payphone specific coding digits for each of the time periods in question, with supporting data establishing the accuracy of such determinations; and award damages to each Plaintiff for each and every completed AT&T access code call and toll free call, based on the Bell Operating Companies' payphone surrogates from each and every payphone owned by a Plaintiff, or by an independent payphone service provider which has assigned its claim for such compensation to a Plaintiff and on whose behalf a Plaintiff acts as the billing and collection agent for compensation, which lines did not have Flex ANI available at least thirty (30) days before the beginning of the quarter;

e. Award Plaintiffs 11.25% simple rate of interest on all required quarterly payments due Plaintiffs, and not timely paid, from the first day of the calendar quarter following submission to AT&T of the list of telephone numbers, or ANIs, of Plaintiffs' respective independent payphone service providers' payphones;

f. Award Plaintiffs their costs of this action, including reasonable attorneys' fees as provided by law; and

g. Grant such other and further relief as the Court deems just and proper.

COUNT II

43. Plaintiffs incorporate herein paragraphs 1 through 34 by reference.

44. On Plaintiff independent payphone service providers' payphone lines on which Flex ANI was available on or before March 1, 1998, AT&T was required to pay Plaintiff independent payphone service providers for each and every completed AT&T access code call and toll free call placed from their payphones during the 2nd Quarter 1998.

45. On each Plaintiff independent payphone service provider payphone line on which Flex ANI was available at least thirty (30) days before the beginning of the next calendar quarter, AT&T was required to pay Plaintiff independent payphone service providers for each and every completed AT&T access code call and toll free call placed from their payphones during the respective subsequent quarters.

46. On all Plaintiff independent payphone service providers' payphone lines other than those in Paragraphs 44 and 45 above, where AT&T elected for the respective calendar quarter not to use the Bell

Operating Companies' average number of completed AT&T access code calls and toll free calls as a surrogate number for the calls completed on Plaintiff independent payphone service providers' payphones, AT&T was required to pay Plaintiff independent payphone service providers for each and every completed AT&T access code call and toll free call placed from a Plaintiff independent payphone service provider's payphone since October 7, 1997.

47. Where AT&T is responsible to pay Plaintiff independent payphone service providers for the actual number of completed AT&T access code calls and toll free calls from Plaintiff independent payphone service providers payphone lines, AT&T has failed, and continues to fail, to:

a. accurately track the number of completed AT&T access code calls and toll free calls that AT&T carries from each payphone; and

b. compensate Plaintiff independent payphone service providers for each actually completed AT&T access code call and toll free call from Plaintiff independent payphone service providers' payphones.

48. In violation of Section 276 of the Act and the rules, regulations, and orders issued by the FCC, AT&T has failed and continues to fail to fully and fairly compensate Plaintiff independent payphone service providers for each and every completed AT&T intrastate and interstate call using a Plaintiff independent payphone service provider's payphone.

49. As a result of AT&T's violation of the FCC's requirements, Plaintiff independent payphone service providers have been damaged through AT&T's failure to pay Plaintiff independent payphone service providers for the total number of compensable calls that AT&T is required to pay pursuant to the Act and the rules, regulations, and orders issued by the FCC.

50. Further, AT&T failed to make its compensation payments to the Plaintiff independent payphone service providers by the required due dates and owe Plaintiffs interest on the late payments.

51. Section 206 of the Act provides that in any case where a common carrier omits to do any act required of it, the common carrier "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." 47 U.S.C. § 206.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

a. Enter judgment in favor of Plaintiffs and against Defendant AT&T;

b. Order Defendant AT&T, at its own expense, to provide Plaintiffs an accounting prepared by an

accounting firm of Plaintiffs' choice, of all compensable calls that AT&T has carried since October 7, 1997, from each and every payphone owned by a Plaintiff, or by an independent payphone service provider which has assigned its claim for such compensation to a Plaintiff and on whose behalf a Plaintiff acts as the billing and collection agent for compensation;

c. Award damages to each Plaintiff in an amount equal to $.284 due for each and every compensable call carried by Defendant AT&T from October 7, 1997 to April 20, 1999, and in an amount equal to $.24 for each and every compensable call carried by Defendant AT&T from April 21, 1999 to present, from each and every payphone owned by a Plaintiff, or by an independent payphone service provider which has assigned its claim for such compensation to a Plaintiff and on whose behalf a Plaintiff acts as the billing and collection agent for compensation, for which AT&T has not yet paid Plaintiff independent payphone service providers;

d. Award Plaintiffs 11.25% simple rate of interest on all required quarterly payments due Plaintiffs, and not timely paid, from the first day of the calendar quarter following submission to AT&T of the list of telephone numbers, or ANIs, of Plaintiffs' respective independent payphone service providers' payphones;

e. Award Plaintiffs their costs of this action, including reasonable attorneys' fees as provided by law; and

f. Grant such other and further relief as the Court deems just and proper.

COUNT III

52. Plaintiffs incorporate herein paragraphs 1 through 51 by reference.

53. On or about October 24, 1997, Plaintiff Peoples entered into a contract with Defendant AT&T which included a requirement that AT&T will pay Peoples the prevailing mandated FCC per-call compensation rate on all calls from the payphones covered by the contract, specifically including access code and toll free calls, on a quarterly basis.

54. The contract requires AT&T to compensate Peoples for each actual AT&T access code call and toll free call from payphones covered by the contract.

55. AT&T has failed, and continues to fail, to:

a. accurately track the number of AT&T access code calls and toll free calls that AT&T carries from each payphone covered by the contract; and

b. compensate Peoples at the prevailing mandated FCC per-call compensation rate for each AT&T access code call and toll free call from the payphones covered by the contract.

56. In violation of the October 24, 1997 contract, AT&T has failed, and continues to fail, to fully and fairly compensate Peoples for each and every

actual AT&T interstate and intrastate access code and toll free call on the payphones covered in the contract.

57. Peoples has performed all conditions precedent for Peoples to comply with the October 24, 1997 contract.

58. As a result of AT&T's breach of the October 24, 1997 contract, Peoples has been damaged through AT&T's failure to pay Peoples for the total number of access code and toll free calls at the rate that AT&T is required to pay Peoples pursuant to the contract.

59. Further, AT&T failed to make its payments to Peoples for each and every actual AT&T interstate access code and toll free call on the payphones covered in the contract by the required due dates and owes Peoples interest on the late payments.

60. The contract provides that AT&T shall indemnify Peoples for attorney's fees and expenses incurred as a result of AT&T's breach of the obligations under the contract.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Peoples respectfully requests that the Court:

a. Enter judgment in favor of Plaintiff Peoples and against Defendant AT&T;

b. Order Defendant AT&T, at its own expense, to provide Plaintiff Peoples an accounting prepared

by an accounting firm of Peoples' choice, of all access code and toll free calls that AT&T has carried since October 24, 1997, from each and every payphone covered by the October 24, 1997 contract;

c. Award damages to Plaintiff Peoples in an amount equal to $.284 due for each and every access code and toll free call carried by Defendant AT&T from October 24, 1997 to April 20, 1999, and in an amount equal to $.24 due for each and every access code and toll free call carried by Defendant AT&T from April 21, 1999 to present, from each and every payphone covered by the October 24, 1997 contract, for which AT&T has not yet paid Peoples;

d. Award Plaintiff Peoples 11.25% per year simple rate of interest on all required quarterly payments due Peoples, and not timely paid, from the first day of the calendar quarter following submission to AT&T of the list of telephone numbers, or ANIs, of the payphones covered under the October 24, 1997 contract;

e. Award Plaintiff Peoples their costs of this action, including reasonable attorneys' fees; and

f. Grant such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs hereby request trial by jury for all issues so triable thereby.

Dated: September 30, 1999

Respectfully submitted,

/s/ Michael W. Ward
Michael W. Ward,
one of the attorneys
for Plaintiffs

/s/ Sean Hanifin
Sean M. Hanifin,
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Washington, D.C. 20004-2688
(202) 662-2000

[Certificate Of Service Omitted In Printing]

EXHIBIT A

APCC Services PSP Customers

PSP	Address
21st Century Communications	9201 W. 112th Terrace Overland Park, KS 66210-
21st Century Enterprises	54 Berkshire Drive Sewell, NJ 08080-
4M Communications, Inc.	982 Polaris Crescent P.O. Box 269 Traverse City, MI 49685-
4M's Communications Co.	P.O. Box 172 Waverly, MN 55390-
A & D Communications	12794 S.E. 90th Road Agency, MO 64401
A Fast Break Vending	11634 Idlebrook Drive Houston, TX 77070-
A&R Communications	24309 Dequindre Road Hazel Park, MI 48030-
A&S Communication Inc.	P.O. Box 38247 Detroit, MI 48238-
A-South Pay Phone	P.O. Box 8 Hope, AR 71802-0008
A.A.A. Payphone, Inc.	7800 Red Road Suite 125A South Miami, FL 33143-
AAA Cocots Inc.	Box 8672 Madison, WI 53708-
AAA Telephone Services Inc.	P.O. Box 15340 Plantation, FL 33318-5340

ABCO Service Company	3941 Legacy Drive #204-124A Plano, TX 75023-
Abeget Telecom	6339 E. Greenway # 102-359 Scottsdale, AZ 85254-
Aberdeen Communications	415 W. Main Street Suite 105 Lansdale, PA 19446-
Acanthus Telecom	314 Charles Smith Road Catskill, NY 12414-
Access Cable & Communication Services, Inc. dba Abacus Telephone Systems	1695 Trapelo Road Waltham, MA 02451-
Access Payphones	41112 Ellen Street Fremont, CA 94538-
AccuCom Inc.	63 Mockingbird Valley Road Winchester, KY 40391
ACD Petroleum, Inc.	302 Pat Booker Road Universal City, TX 78148-
Ace Telephone Service	3730 Crellin Circle Las Vegas, NV 89120-
ACI Communications	P.O. Box 6136 Spring Hill, FL 34611
ACM Ltd./ACTEL	P.O. Box 102 Skokie, IL 60076-
Actel, Inc.	P.O. Box 391 Cedar Knolls, NJ 07927-

Action Telecom	4100 E. Morse Road Lodi, CA 95240-
Active Pay Phones	2724 Anthony Avenue Bellmore, NY 11710-
Adam Telloian	9567 N. Barton Fresno, CA 93720-
ADTEL	1328 Lancaster Place Louisville, KY 40222-
Advanced Lightwave Communications	125 Fulton Street SW Warren, OH 44483-
Advanced Technologies Communications	2660 E. Ganley Road Tucson, AZ 85706-
Advantage Payphones, Inc.	P.O. Box 6460 Ashland, VA 23005-
Afford-A-Call, Inc.	P.O. Box 46736 St. Louis, MO 63146-
AGI Coin Phone Systems	241 Perkins Street E. 401 Boston, MA 02130-4057
AGR Telecom	1645 S. Bascom Avenue Suite 7 Campbell, CA 95008-
Airport Commcenters	2331 Knobhill #15 Okemos, MI 48864-
AirTime Communications	4007 81st Avenue Court N.W. Gig Harbor, WA 98335-
AIT, Inc.	6339 Indianapolis Boulevard Hammond, IN 46320-
Ajar Payphones, Inc.	631 Seminole Avenue N.E. Atlanta, GA 30307-1464

Alamo Telecom Inc.	P.O. Box 65135 San Antonio, TX 78265-
Alan Markel dba Huntsville Pay Phone Company	11410 Woodcrest Drive S.E. Huntsville, AL 35803-
Albert T. Stoll	6365 Casabella Lane Boca Raton, FL 33433-5436
Alco Telecommunications	517-74th Street Apt. 205 North Bergen, NJ 07047-
Alexander Payphone Communications, Inc.	201 Corpus Christi Street Laredo, TX 78040-
All County Security Inc.	50 Trail of Hemlocks Putnam Valley, NY 10579-1420
All County Telecom, Inc.	P.O. Box 447 Valley Cottage, NY 10989-0447
All Tech Telephone	64 Kinry Road Poughkeepsie, NY 12603-
All-Tech Telecom Inc.	3730 Crellin Circle Las Vegas, NV 89120-
Allegheny Telephone Co.	6245 Saltsburg Road Pittsburgh, PA 15235-
Alliance Payphone, Inc.	2355 Foothill Boulevard #812 La Verne, CA 91750-
Allvend, Inc.	2654 Agriculture Street New Orleans, LA 70122-
Alpha Phones, Inc.	928 Shady Lane Lake Charles, LA 70601

Alpha PT3	2311 Kingsway Drive League City, TX 77573-
Alpha Telcom, Inc.	2751 Highland Avenue Grants Pass, OR 97526-
Alpine Communications	8420 W. 3rd Place Lakewood, CO 80226-
Alternative Communications	5110 Manning Road Indianapolis, IN 46228-2059
Alternative Communications, Inc.	13353 Kingsfield Court Granger, IN 46530-
Alvin E. Gross, Inc.	1935 Upshur Street N.W. Washington, DC 20011-
Americall	P.O. Box 720697 Norman, OK 73070-
AmeriCall Enterprises, Inc	6000 Live Oak Parkway # 111-A Norcross, GA 30093-
Americall Payphone LLC	8247 Hascall Omaha, NE 68124-
American Communications	126 N. First Street Dekalb, IL 60115-
American Communications of Ohio	P.O. Box 351 New Albany, OH 43054-
American General Payphone	3116 E. Shea # 252 Phoenix, AZ 85028-
American Global Telcom, Inc.	8636 Port Said Street Orlando, FL 32817-
American Inc.	3843 St. Clair Cleveland, OH 44114-

American Pay Telephone	4387 Swamp Road #215 Doylestown, PA 18901-
American Pay-Tel, Inc.	3330 Lockwood Court Lilburn, GA 30047-
American Payphone Services	25 Lowell Street Wilmington, MA 01887-
American Payphone, Inc.	4105 Westbank Drive #102 Austin, TX 78746-
American Paytel LLC	14235 N. 69th Place Scottsdale, AZ 85254-
American Paytelephone, Inc.	999 Chanceford Avenue York, PA 17404-
American Public Payphone Corp. (APP Corp.)	1201 U.S. Highway One Suite 200 North Palm Beach, FL 33408-
American Telephone Exchange	1085 Tanglewood Drive Cookeville, TN 38501-
Americoin Pay Telephone Company, Inc.	999 East Basse Road Suite 180 San Antonio, TX 78209-
Americom, Inc.	2236 Bluemound Road Suites B & C Waukesha, WI 53186-
Americomm Network, Inc.	13807 Longs Landing Road East Jacksonville, FL 32225-
Ameritel	4554-C Caterpillar Rd. Redding, CA 96003-

Ammcomm Inc.	9620 62nd Avenue S.E. Olympia, WA 98513-
AMNEX Telecommunication, Co.	8520 SW 133 Court Miami, FL 33183-
Amtel, Inc.	P.O. Box 242 Franklin, LA 70538-
Amtel/ATN, Inc.	919 Dilworth Street St. Marys, GA 31558-
Amy Householder	3920 Fry Road Ostrander, OH 43061-
Andrew Edlin	2182 Briarcliff Road #1 Atlanta, GA 30329-
Anju Enterprises (Parkway Chevron)	6101 N. Freeway Houston, TX 77076-
Annabelle Comm. Corp.	6759 Glenview Road Mayfield Village, OH 44143-
Anywhere USA	177 Turp Road 191 Kitts Hill, OH 45645-
Apollo Communications, Inc.	P.O. Box 326 Plainfield, NH 03781-
Apple Phone Vending/ Vincent Napoli	346 Gifford Hollow Road Berne, NY 12023-
Ardan Communications	223 Cypress Trace Tarpon Springs, FL 34689-
Arizona Coin Telephone, Inc	955 Eveningstar Tempe, AZ 85283-
Arizona Pay Phones	P.O. Box 31002 Phoenix, AZ 85046-

Arizona Vending Service Inc.	1833 E. Baseline Road #253 Gilbert, AZ 85233-
Arlen Communications, Inc.	15 Stillwright Way Key Largo, FL 33037-
Arnold Cook, LTD	2323 N. Central Avenue #1706 Phoenix, AZ 85004-
Arrow Phone Company, Inc.	P.O. Box 1048 Hampton, NH 03843-1048
Associated Communications and Services Co.	2824 North Avenue Richmond, VA 23222-
AStart Telecommunications, Inc.	46 Woodbridge Drive East Longmeadow, MA 01028-
AT & Key Comm. Corp.	2 Steuben Park Utica, NY 13501-
Atlanta Link Technologies, Inc.	905 Went Worth Court Alpharetta, GA 30022-
Atlantic Diversified Technologies, Inc.	765 W. Little Creek Road Suite 1 Norfolk, VA 23505-
Atlantic Services	4745 Irvin Square Alexandria, VA 22312-
Atlantic Telecoin Systems	701 Broadway Revere, MA 02151-
Atlantic Telephone Services	1730 Mine Lane Road Easton, PA 18045-
Attima Inc.	155 Clearwater Drive Media, PA 19063-

Attoe Enterprises	1309 East 17th Street Box 486 Marshfield, WI 54449-
ATU Telecommunications	600 Telephone Avenue MS#47 Anchorage, AK 99503-
Austin PayFones, LLP	13357 Pond Springs Road Austin, TX 78729-
Automated Telecom Technology, Inc. dba A-Tel, Inc.	2291 A Waynoka Road Colorado Springs, CO 80915-
Automatic Vending	849 Union Street Portsmouth, RI 02871-
AVS Telecommunications	P.O. Box 1113 Port Jervis, NY 12771-
Award-1-Telecom	15585 11 Mile Road Roseville, MI 48066-
Axiom Communications	35-15 23rd Avenue Astoria, NY 11105-
Azmetro Communications Inc	P.O. Box 15034 Scottsdale, AZ 85267-5034
Aztec Communications Inc.	13349 Kingsman Road Woodbridge, VA 22193-
Aztech Communications	2 Smethwycke Drive Cinna, NJ 08077-
B & S Payphone Co.	4535 S. Atlantic Avenue Unit 2504 Ponce Inlet, FL 32127-

B & T Enterprises	P.O. Box 1545 Lake Charles, LA 70602-
B&A Comm, Inc.	2351 W. Northwest Hwy. #2118 Dallas, TX 75220-
B&B Telcom Inc. dba Empire Vending	10058 Spanish Isles Boulevard Suite F-28 Boca Raton, FL 33498-
B&G Payphones	P.O. Box 162434 Fort Worth, TX 76161-
B&P Company	5509 Tanbark Dallas, TX 75229-
B. Neer Communication	10607 Sageyork Houston, TX 77089-
B.B.I.	3375 Dietz Drive Cookeville, TN 38506-
B.C.T. Telco Inc.	38 Cypress Avenue North Caldwell, NJ 07006-
B.D.A. Sales Inc.	2035 Victory Boulevard Staten Island, NY 10314-
Bair Payphones, Inc.	4116 Dalewood Drive Fort Wayne, IN 46815-
Baker Public Communications	4222 Chipley Drive Pasadena, TX 77505-
Bancorp Telecommunications, Inc.	7072 Bentwood Drive Bay City, MI 48706-
Barba's Keystone Ent.	504 Kentwood Drive Mechanicsburg, PA 17055-

Barber Enterprises	480 N. Pioneer Road Fond Du Lac, WI 54937-
Barnes Telcomm, Inc.	P.O. Box 26645 Philadelphia, PA 19141-
Barry Russell	P.O. Box 278 Ridge, NY 11980-
Bashas Inc. (Vending)	P.O. Box 488 Chandler, AZ 85244-
Baton Rouge Payphone, Inc.	11375 Darryl Drive Baton Rouge, LA 70815-
Bay Comm Consulting	1010 Rennie Lake Road Traverse City, MI 49686-
Bay State Telephone	350 Massachusetts Avenue Arlington, MA 02474-
BCS Systems, Inc.	38434 Kingsbury Livonia, MI 48154-
BCT Communications	P.O. Box 18033 Richmond, VA 23226-
Beals Pay Phones LLC	516 W. Encanto Boulevard Phoenix, AZ 85003-
Bearcom Telecommunications, Inc.	2409 Shorewick Highlands, TX 77562-
Bell-A-Gram	145 E. Delilah Road Pleasantville, NJ 08232-
Belle Farms Estates	3811 Courtleigh Drive Randallstown, MD 21133-
Ben Burnett, Inc.	Skirmish Run Court Richmond, VA 23228-

Bercy Communications Co.	P.O. Box 10105 Trenton, NJ 08650-
Berkmont Communications, Inc.	15 Benner Road Royersford, PA 19468-
Bernard Communications	2720 S. Gen. Wainwright Lake Charles, LA 70615-
Bert Lopez	765 Kaminski Drive Rahway, NJ 07065-
Bethesda Payphones c/o Tel & Tel Payphones	4943 Harford Avenue Beltsville, MD 20705-
Bethlene Enterprises Inc.	2360 Hamburg Turnpike Wayne, NJ 07470-
Beuford B. Wentworth dba AT&E	12609 Condor Drive Jacksonville, FL 32223-
Big Apple Telecommunications, Inc.	14 Glen Cove Road Roslyn Heights, NY 11577-
Bird Nest Ventures, Inc.	P.O. Box 1046 Seminole, OK 74818-1046
BJD Telecom, Inc.	1623 Michigan Avenue Virginia Beach, VA 23454-
BNL Communications	425 N. Lawnedale Kansas City, MO 64123-
Bopp Telecommunications	3245 W. 135th Avenue Broomfield, CO 80020-
Bosch Telecommunications, Inc.	123 Oak Crest Drive Moncks Corner, SC 29461-
Botel Company, Inc.	P.O. Box 621776 Orangevale, CA 95662-

BPS Communication	Route 1 Box 211 Cheraw, SC 29520-
Brent Woodall dba SSASTAR Communications	2304 Apple Pie Ridge Road Winchester, VA 22603-3202
Brian K. Lewis	1342 Golfair Boulevard Jacksonville, FL 32209-
Brian Rudy	104 Timberline Drive Douglassville, PA 19518-
Brock Atlantic Telephone Inc.	16 Boxwood Drive Fairfield, NJ 07004-
Brock Telecom Company	P.O. Box 169 Bishop, GA 30621-0169
Brooklyn Connection Corp.	7304 5th Avenue Suite 248 Brooklyn, NY 11209-
Brooks Webb or Tom Marshall	1500 Waterway Court Chesapeake, VA 23322-1233
BTE (Payphone)	5946 Fulton Street San Francisco, CA 94121-
BTI PayPhones	P.O. Box 2270 Spring, TX 77383-
Buca Telecom	P.O. 12674 Odessa, TX 79768-
Buckeye Payphone Service, Inc.	1669 W. 130th Street #2-2 Hinckley, OH 44233-
Budtel	1670-B Winchester Road Bensalem, PA 19020-
Buffalo Coin Phone	2050 Niagara Street Buffalo, NY 14207-

Burney Communications Group	P.O. Box 823436 South Florida, FL 33082-3436
Burwil Communications	P.O. Box 70682 Sunnyvale, CA 94086-
Business Resource Group, Inc.	14825 Spring Hill Drive P.O Box 737 Frenchtown, MT 59834-0737
C & M Telecommunications Co.	55B Victory Court Dover, NJ 07801-
C DOS J Systems Inc.	P.O. Box 2305 Windermere, FL 34786-
C&F Phones	274 Red Oak Drive Pittsburgh, PA 15239-
C&H Enterprises	P.O. Box 131 Conway, SC 29526-
C&J Communications	3107 E. Washington Boulevard Fort Wayne, IN 46803-
C&S Enterprises	18610 Lower Lake Road Monument, CO 80132-
C&S Phone Assoc. Inc.	420 N. 9th Avenue Scranton, PA 18504-
C.B. Management	P.O. Box 731 Richmond, TX 77406-
C.I.C. Communications, Inc.	428 East 89 Street New York, NY 10128-
C.N. Johnson dba Tataka	2011 W. 1700 So. #1 Salt Lake City, UT 84104-

Cal Landau Ent.	225 Hendricks Isle Fort Lauderdale, FL 33301-
Calif Tele-Comm	32017 Elbow Court Visalia, CA 93291-
California Coin-Tel	3142 Boulder Place Madera, CA 93637-
Call Communications, Inc.	1226 Pineburst Road Staunton, VA 24401-
Call West Communications, Inc.	8008 Cedar Springs Lock Box 11 Dallas, TX 75235-
Camco Paytelephone Company	827 Mt. Pleasant Road Bryn Mawr, PA 19010-
CAN AM Telecommunications, Inc.	7282 55th Avenue East Suite 130 Bradenton, FL 34203-
Capital Telephone Services, Inc.	225 Old Loudon Road Latham, NY 12110-
Capitol Amusement Distributors Corp.	3064 N. 30th Avenue Phoenix, AZ 85017-
Caprock Coin Phone, Inc.	P.O. Box 64652 Lubbock, TX 79464-
Cardinal Communications	111 Park Street Mingo Junction, OH 43938-
Carlson Enterprises	2234 South 14th Street Fort Dodge, IA 50501-
Carousel Payphones	16902 Bmt. Highway Houston, TX 77049-

Carson Telecom	21 Whispering Circle Byron, GA 31008-
Casco Pay Phones, Inc.	8381 Poplar Pike Germantown, TN 38138-
Casual Communications Corp.	2805 Ripple Way White Lake, MI 48383-
CatCom Services	5900 Brookhaven Drive Plano, TX 75093-
CBX, Inc.	14311 Shannon Ridge Road Houston, TX 77062-2047
Celtic Communications Company	904 Cherry Lane P.O. Box 390 Vestal, NY 13850-
CEMSCO SYSTEMS	22926 Dolorosa Street Woodland Hills, CA 91367-
Cen-Tex Pay Telephone Co., Inc.	13314 Deer Falls San Antonio, TX 78249-
Centel of Washington, Inc.	320 Birch Street Leavenworth, WA 98826-
Centennial Communications	6300 Shallow Ford Way Douglasville, GA 30135-
Central Telephone Inc.	P.O. Box 25 Goldendale, WA 98620-
Central Telephone Service	17427 Osprey Road Arlington, WA 98223-
Central Texas Phone Inc.	3415 Greystone #304 Austin, TX 78731-
Chapman Services, Inc.	310 Greenfield Road Shorewood, IL 60431-9674

Charity Technologies	16 Greenridge Drive Brookfield, CT 06804-
Charles Hart Communications Inc.	6097 State Hwy 173 Cochranton, PA 16314-
Charles W. Stephens dba A&S Telecommunications	587 W. Little Richland Road Waverly, TN 37185-
Charlie E. Baker	209 East 3rd Street Superior, WI 54880-
Chase Communications Corporation	2431 Crofton Lane #10 Crofton, MD 21114-
Chateau Telecom Service	862 Twin Lakes Drive Sumter, SC 29154-
Cherokee Telephone Co., Inc.	P.O. Box 4931 Huntsville, AL 35815-
Choicetel Communications, dba Intelliphone	9724 10th Avenue N. Plymouth, MN 55441-
Christian Payphone & Communications	P.O. Box 125 Prospect Hill, NC 27314-
Chronometric Telecom Inc. (CTI)	112-09 14th Avenue P.O. Box 564340 College Point, NY 11356-
ChurchHill Public Communications, Inc.	P.O. Box 4157 Andover, MA 01810-
City Public Phones Inc.	837 Fr. Capodanno Boulevard Staten Island, NY 10305-
City Tele Coin Company Inc.	110 Southwood Bossier City, LA 71111

City Telephone Company	P.O. Box 50125 Lighthouse Point, FL 33074-
Clark & Sipe LLC	9708 Stoney Run Court Charlotte, NC 28269-
Cleburne Communications	455 County Road 104 Muscadine, AL 36269-
Clipper Telecommunications Inc.	1201 FM 2673 Canyon Lake, TX 78133-
Clyde A. Edwards	3401 S.W. 147 Avenue Miramar, FL 33027-
CMR Communications	181 Cardigan Circle Lilburn, GA 30047-
CMZ Communications, Inc.	413 Congress Avenue East Williston, NY 11596-
CNO-Intel Communications, Inc.	P.O. Box 2727 Gulfport, MS 39505-
Coast to Coast Telecom Inc.	P.O. Box 478 Belcamp, MD 21017-
Coastal Communication Service, Inc.	150-17 12th Road Whitestone, NY 11357-
Coastal Communications Enterprises Inc.	P.O. Box 41232 Norfolk, VA 23541-
Coastal Telephone Systems, Inc	6 Apache Trail Myrtle Beach, SC 29575-
Cof-Car Inc.	3901 Brownsville Road Pittsburgh, PA 15227-3421
Coin Call Inc.	2200 Michener Street Unit 7 Philadelphia, PA 19115-

Coin Communications Inc.	1629 Lakeview Avenue Dracut, MA 01826-
Coin Communications, Inc.	3290 East 140 Street Cleveland, OH 44120-
Coin Drop Corp.	10221 Harbortown Court Boca Raton, FL 33498-
Coin Op Phone Service	323 Old Bridge Turnpike East Brunswick, NJ 08816-
Coin Operated Telephone Services	352 Route 15 Jericho, VT 05465-
Coin Star Communications, Inc.	2316 Pine Ridge Road Suite 373 Naples, FL 34109-
Coin System Services Inc.	1863 Pond Road Suite 8 Ronkonkoma, NY 11779-7241
Coin Tel	213 Northridge Circle Nashville, TN 37221-
Coin Tel Systems	P.O. Box 723 Dayton, TN 37321-
Coin Telecom Systems	1 Windsong Lane Friendswood, TX 77546-
Coin Telephone Service	105 Rudy's Drive Lumberton, NC 28358-
Coin Telephones, Inc. (CTI)/Paycomm Inc.	8000 Lindisfarne Drive Pittsburgh, PA 15237-
Coin Tell Communications	2870 S. 500 W. Russiaville, IN 46979-

Coin-Com, Inc.	P.O. Box 348 Fairmont, WV 26555-
Coin-Tel Communications Systems, LLC	46 Nyselius Place Stamford, CT 06905-
Coin-Tel Payphones, Inc.	280 South Parkway Golden Beach, FL 33160-2219
Coin-Tel, Inc.	5122 West Knox Street Tampa, FL 33634-
Coin-Tel, Incorporated	726 East Long Avenue New Castle, PA 16101-
Coincall Plus Corp.	162 1/2 E. Newman Springs Road Redbank, NJ 07701-
Coinlink LLC	HC 70 Box 268 Boswell, OK 74727-
Cointel Communications, Inc.	225 Merry Point Road Lancaster, VA 22503-
Cointel, Inc	26901 15th Avenue N.E. Arlington, WA 98223-
Cointel, Inc.	5 Rivers Drive Great Neck, NY 11020-
Collect-A-Phone, Inc.	3401 E McDowell Road Phoenix, AZ 85008-
Collett Vending	P.O. Box 1387 Ukiah, CA 95482-
Collins Telecom	410 Glenloch Road Ridley Park, PA 19078-

Colorado Pay Phones	6711 West 51st Avenue Arvada, CO 80002-
Columbia Telephone Company	929 Jersey Ridge Road Maysville, KY 41056-
Com-Tech Systems	3709 Westway Suite A Tyler, TX 75703-
Comchoice Inc.	1301 FM 2673 Canyon Lake, TX 78133-
Comchoice L.L.C.	8115 FM 2673 Canyon Lake, TX 78133-
Comet Communications Inc. (fka JC Payphones)	1152-65th Brooklyn, NY 11219-
Comm-Wire, Inc.	P.O. Box 420172 Atlanta, GA 30342-
Commercial PayPhones Inc.	8510 NW 56 Street Miami, FL 33166-
Commercial Telephones, Inc.	8510 NW 56th Street Miami, FL 33166-
Commonwealth Telephone Co.	173 Maplewood Street Malden, MA 02148-
Communication Connection	20042 Buckland-Holden Road Cridersville, OH 45806-
Communication Management Services, Inc.	5610 NW 12th Avenue Suite 211 Fort Lauderdale, FL 33309-
Communication Systems Int'l, Inc. (CSI)	6335 Camp Bullis Road Suite 5 San Antonio, TX 78257-

Communications Solutions	320 Kelly Davis Road Richmond Hill, GA 31324-
Communications Vending of Southern Colorado, Inc.	610 Elkton Drive Colorado Springs, CO 80907-
Community Telephone Co.	2113 Preston Square Court Falls Church, VA 22043-
Comptel Corporation	145 E. Delilah Road Pleasantville, NJ 08232-
Computer Electronic Telecom Services	Route 5, Box 91A Littleton, NC 27850-
Computerized Payphone Systems	618-F Guilford College Road Greensboro, NC 27409-
Comtel	19 Valmoore Drive Poquoson, VA 23662-
Comtel LLC	3114 Clover Street Pittsford, NY 14534-
Connect America	10112 Bozeman Drive New Port Richey, FL 34655-
Connecticut Payphone LLC	16 Forty Acre Mountain Road Danbury, CT 06811-
Connecticut Public Phone, Inc.	665 Foxon Road 2nd Floor East Haven, CT 06512-
Consumer Communications	5126 W. County Road T Freemont, NE 68025-
Contel Phone Company Inc.	7203 19th Avenue Brooklyn, NY 11204-

Corbryn Paytel, Inc.	8132 S. Palm Drive Tempe, AZ 85284-
Cotel, Inc.	8391 Beverly Boulevard # 283 Los Angeles, CA 90048-
Covenant Development Corp.	9649 S.E. Foster Road Portland, OR 97266-
Cowbell Communications	6 Plata Court Novato, CA 94947-
Coyote Call, Inc.	14927 Caenen Olathe, KS 66062-
CPN Communications	1739 E. Broadway Road Suite 300 Tempe, AZ 85282-
Creative Hairdressers, Inc.	2815 Hartland Road Falls Church, VA 22043-
Creative Hairdressers, Inc.	2815 Hartland Road Falls Church, VA 22043-
CRS Communications, Corp.	225 Walter Road River Ridge, LA 70123-
Crurdishenk Communications	9615 Blake Lane Fairfax, VA 22031-
Crystal Clear Communications, Inc.	215 East Main Norman, OK 73069-
CSJ Pay-Phones/ Hollywood Gong	P.O. Box 291425 Los Angeles, CA 90029-
CTS Communications	P.O. Box 48098 Cumberland, NC 28331-

Cumberland Telecom	105 Second Avenue N. Nashville, TN 37201-
Currier Communications	Box 6823 Ithaca, NY 14851-
Custom Business Communications	6209 Coffman Road Indianapolis, IN 46268-
CyberTech and Cybertech LLC	1137 Parklawn Drive Lexington, KY 40517-
D & P Telephone Company	2305 East Bayshore Drive Palacios, TX 77465-
D & T Payphones, Inc.	930 Tulip Grove Road Hermitage, TN 37076-
D and B Telephones, Inc.	107 Sproles Benbrook, TX 76126-
D&B Leasing	14386 W. Carlin Drive Surprise, AZ 85374-
D&D Marketing, Inc.	4932 Battle Forest Cove Memphis, TN 38128-
D&L Comm. Inc.	15548 South Park EastPointe, MI 48021-
D&L Communications	19207 Savage Road Union Grove, WI 53182-
D-Mark Payphone Services	4607 Cypresswood Drive #1105 Spring, TX 77379-
D.G.C. Investment Company, LLC.	4438 Old Fox Trail Midlothian, VA 23112-
D.J. Ellet	17923 E. Tallyho Drive South Bend, IN 46635-

D.J. Pay Phone	301 Chippendale Court Louisville, KY 40214-
D/FW Telecommunications Inc.	P.O. Box 92623 Southlake, TX 76092-0623
DAAC Communications	312 Pinyon Lane Coppell, TX 75019-
Dal Vending	8507 Cold Lake Drive Houston, TX 77088-
Dalworth Vending Services Inc.	2010 Hearthstone Drive Carrollton, TX 75010-
Dancom Communication	1801 Palm Valley Boulevard Suite 1815 Round Rock, TX 78664-
Daniel J Ham dba Telstar	440 S.E. Youngston Lane Lee's Summit, MO 64063-
Daniel Payphones, Inc.	12025 Shandon Circle Charlotte, NC 28226-
Daniel S. Davis & Associates Inc. dba DSD Communications	2172 Lyndway Road Beachwood, OH 44122-
Dantel Communications Co.	84 N. Ritters Lane Owings Mills, MD 21117-
Darrell D. Cheney	10313 Lanes Bridge Drive Madera, CA 93638-
Datone Communications Inc.	106 Glenwood Drive Liverpool, NY 13090-
David Mandeville	1725 Ashland Street Jacksonville, FL 32207-

David Rambo	1665 Carnation Boulevard Batavia, IA 52533-
David Shurkin	1937 E 13th Street Brooklyn, NY 11229-
David Swearingen	220 East 6th Street Jacksonville, FL 32206-
David Tan	318 Argonaut Avenue San Francisco, CA 94134-
Davis Associates dba Atlanta Payphone & Vending, Inc.	595 Piedmont Road Suite A-108 Atlanta, GA 30308-
Davren Industries	5725 Stonybrook Grand Rapids, MI 49546-
Davron Enterprises	1202 Parody Lane St. Charles, MO 63303-
Day-Tel Systems	1784 Big Hill Road Kettering, OH 45439-
DCW Enterprises	25 Harvard Lane Commack, NY 11725-
DeJean's	421 Cornell Place Ventura, CA 93003-
Del Tel Inc.	660 1/2 S. Santa Fe Fountain, CO 80817-
Delaware State Telephone Co.	901 Rockmoss Avenue Newark, DE 19711-
Delmarva Vending Corp T/A Delmarva Toll Call	10802 Bishopville Road P.O. Box 211 Bishopville, MD 21813-

DeLong Industries Group, Inc.	17165 Newhope Street E Fountain Valley, CA 92708-
Delta Communications, Inc.	5115 Shreveport Hwy Suite 2 Pineville, LA 71360-
Denton Payphone Services	3602 Fishers Hill Court Fairfax, VA 22033-
Derrell Fagan	1190 Lionsgate Lane Gulf Breeze, FL 32561-
Desert Communication	8237 Bermuda Beach Drive Las Vegas, NV 89128-
Desert to Sky Comm. LLC	8705 W. Bluefield Peoria, AZ 85382-
DGI Communications	216 West 7th Street Columbia, TN 38401-
Dial Tone Communications, Inc.	22 Blue Heron Drive Staten Island, NY 10312-
Dial-Up Communications	325 Sunset Drive Ashland, KY 41101-
Diamond Communication Services	204 Justice Street Chapel Hill, NC 27516-
Diamondback Payphone	5458 West Mohawk Lane Glendale, AZ 85308-9331
Digital Security Systems Inc. dba Digital Payphone Co.	11309 Norcom Road Philadelphia, PA 19154-
Digital Technologies Inc.	1 Maiden Lane Toms River, NJ 08753-

Ding-A-Ling Communications, Inc.	3640 Katy Hockley Road Katy, TX 77493-
Direct Access	314 Pine Forest Lane Forked River, NJ 08731-
DiTel Communications	14654 Guarani Street N.W. Andover, MN 55304-
DJ Communications	P.O. Box 75 Verona, PA 15147-
DJ Communications, Inc.	1614 Pebble Beach Lane Lady Lake, FL 32159-
Dominion Enterprises, Inc.	1280 SOM Center Road Suite 224 Cleveland, OH 44124-
Donald J. Childers dba Quality Wholesale Communications	P.O. Box 275 Cordova, TN 38088-0275
Dontel Communications	12614 McClelland Avenue Grant, MI 49327-9622
Doskey Communications, Inc.	P.O. Box 1145 Metairie, LA 70004-1145
Double J Enterprises	25812 Tamarisk Drive Madera, CA 93638-
Drake Telephone	P.O. Box 8304 Cherry Hill, NJ 08002-
Drew Communication Inc.	7112 18th Avenue Brooklyn, NY 11204-
DTK Communications	56 Spackenkill Road Poughkeepsie, NY 12603-

DWM Phones	2417 Cat Cay Lane Fort Lauderdale, FL 33312-
E & E Communications	21308 Seneca Crossing Drive Germantown, MD 20876-
E&G Enterprise	215 E. Sierra View Drive Jackson, CA 95642-
E&H Tel, Inc.	2651 S. Course Drive Suite 109 Pompano Beach, FL 33069-
E&R Payphones	1304 Christopher Court Metairie, LA 70001-
E-Z Stop Food Marts, Inc.	P.O. Box 6618 Maryville, TN 37802-
E.E.T.S.	4501 Northwood Drive Bryan, TX 77803-
E.J. Communications, Inc.	7709 Willow Hill Drive Landover, MD 20785-
Eagle Communication	P.O. Box 173 South Amboy, NJ 08879-
Eagle International Telecom	4630 Live Oak Court Ellicott City, MD 21043-
Eagle Network Services	915 Dragon Street Dallas, TX 75207-
Eagle Wing Telecom	P.O. Box 1060 Suite 122 Bronxville, NY 10708-
East Coast Connections	295 Forest Hills Street Boston, MA 02130-

East Coast Phones, Inc.	5038 Old Ivy Road Duluth, GA 30096-
East Harlem Unity Communications, Inc.	P.O. Box 1001 New York, NY 10029-
Eastern Atlantic Telephone	1533 Harvey Lane Pottstown, PA 19465-
Eastern Phone Communications	1059 Rimrock Road Greensburg, PA 15601-
Eastern Telecomm. Inc.	26 Goodhart Drive Livingston, NJ 07039-
Eastern Telephone Service	P.O. Box 97712 Raleigh, NC 27624-7712
Easy Communications LLC	790 Broad Street Newark, NJ 07102-
EasyCoin Vending Corp.	22 S. Madison Avenue Spring Valley, NY 10977-
ECG Communications, Inc.	P.O. Box 20226 Columbus, OH 43220-
Econo-Products	2823 Newport Boulevard PMB 112 Newport Beach, CA 92663-
Edwards Equipment Co. Inc. of Asheville	156 Church Street P.O. Box 669 Asheville, NC 28802-
EHT, Inc. dba Capital Communications	209 Stonewood Court West Columbia, SC 29170-
El Cerrito Shell	10602 San Pablo Avenue El Cerrito, CA 94530-2620

Elite Communications, Inc.	26 Stanley Boulevard Sabattus, ME 04280-
Ellington Enterprises	3906 Gingko Court Lafayette, IN 47905-
Emerging Communications, Inc.	2630 Austins Way Sugar Land, TX 77478-
Empire Pay Phone	P.O. Box 171 Garwood, NJ 07027-
Empire State Payphones Inc.	405 Tarrytown Road Suite 394 White Plains, NY 10607-
Empire Telephone, Inc.	P.O. Box 2968 Ferndale, WA 98248-
Encina Corporation	1408 Broadmoor Richardson, TX 75082-
Endless Mountain Telecom Inc.	RR4 Box 4194 Wyalusing, PA 18853-
England Economic and Industrial Development District	1611 Arnold Drive Alexandria, LA 71303-
Equity Pay Telephone Co., Inc.	5747 Highway 17 North Guyton, GA 31312-
ERS Express Communications	4903 Rainier S. Seattle, WA 98118-
ETS Payphones, Inc.	561 Thornton Road Suite K Lithia Springs, GA 30122-
Evelyn & Kenneth Wells Limited Partnership	505 S. Roy Reynolds Harker Heights, TX 76548-

Excel Communications	P.O. Box 66698 Los Angeles, CA 90066-
Executive Communications	P.O. Box 850617 Braintree, MA 02185-
Executive Telecommunications	5543 Edmondson Pike Suite 208 Nashville, TN 37211-
Expertel/Alarmco, Inc.	2510 Parade Street Erie, PA 16503-
Exponential Systems	19360 Rinaldi Street # 160 Northridge, CA 91326-
Extra Effort Pay Phones, Inc.	6813 Northampton Way Houston, TX 77055-
EZ Phone, Inc	1401 West Flagler Street Miami, FL 33135-
F.J. Hanning Enterprises, Inc.	4720 Sturtz Drive Metairie, LA 70001-
F.P. Wade, Inc.	14082 SW 139 Court Miami, FL 33186-
Fasolino Enterprises, Ltd	Tyrrell Road RR4 Box 209 Pleasant Valley, NY 12603-
Fertel Communications Corp.	16007 S.W. 155th Avenue Miami, FL 33187-
Fibercom	5008 Simon N.W. Albuquerque, NM 87114-
Finder Communication Services, Inc.	1365 New London Avenue Cranston, RI 02920-

First American Telecom	1527 N.E. 4th Avenue Fort Lauderdale, FL 33304-
First Telecommunications Corp.	3663 Broadmoor S.E. Grand Rapids, MI 49512-
Flo-Fones	P.O. Box 6012 Oxnard, CA 93031-
Florida Coast System	520 SE 12th Street Dania, FL 33004-
Florida Pay Phone Services Inc.	1821 N.W. 40th Street Oakland Park, FL 33309-
Florida PayPhone Systems Inc.	2815 Taylor Street Hollywood, FL 33020-
Floridays Communications	1719 Hoffner Avenue Orlando, FL 32809-
Fone's For You	275 East Robles Santa Rosa, CA 95407-
Fort Bragg Music & Vending, Inc.	P.O. Box 99 Fort Bragg, CA 95437-
Fort Wayne Payphones, Inc.	6021 North Clinton Street Fort Wayne, IN 46825-
Fortson Distributing Company	419 Colville Road Charlotte, NC 28207-
Four C's Communications	4125 Dove Road Lot 83 Port Huron, MI 48060-
Four Seasons Enterprises	16804 NE 119th Street Brush Prairie, WA 98606-
Frank Leone	P.O. Box 296 Abington, PA 19001-

Fredericksburg Telephone Co.	506 Sunset Fredericksburg, TX 78624-
Freedom Pay Telephones	316 Anna Lane Sykesville, MD 21784-
Frontier Tel. Co., Inc.	P.O. Box 1765 Lamar, CO 81052-
Fryer Communications dba Communications South	P.O. Box 211837 Columbia, SC 29221-6851
Future Focus Telecommunications, Inc.	14 Bond Street Suite 211 Great Neck, NY 11021-
Future Phones	904 Burlington Drive Evans, GA 30809-
Fylde Communications	166 East 35th Street Apt. 4B New York, NY 10016-
G & A Telecommunication	2713 Carmel Drive Carrollton, TX 75006-
G & G Communications	P.O. Box 578 Osprey, FL 34229-
G & M Sales	1630 Medical Lane Suite C Fort Myers, FL 33907-
G's Pizzeria	200 West Haughler West Branch, MI 48661-
G-Systems Inc.	126 Elizabeth Street New York, NY 10013-
G.A.G. Communications	3532 E. Clark Road Phoenix, AZ 85050-

G.L. Bell	6655 Mocking Bird Road Cumming, GA 30040-
G.W.B., Inc.	3783 S. 500 W. #6 Salt Lake City, UT 84115-
Garden State Telco	Box 239 Little Silver, NJ 07739-
Garrard Distributing	1666 East Canyon Road Lakepoint, UT 84074-
Gary Goldfeder dba DGD Technology	890 N. Mill Street Suite 106 Lewisville, TX 75057-3166
Gateway Communications	353 Blue Valley Road Port Angeles, WA 98362-
Gaylo Walz	8229 N. 57th Drive Glendale, AZ 85302-
Gemini Companies, Inc.	813 East 61st Street Sioux Falls, SD 57108-
General Communication Services	11150 Santa Monica Blvd Suite 1220 Los Angeles, CA 90025-
Genesis Communication of Rochester Inc.	45 Cedarfield Commons Rochester, NY 14612-
Genesis III Inc.	P.O. Box 2264 Suffolk, VA 23432-
George Delo Co.	13515 Delancy Road Woodbridge, VA 22193-
George Tope Company, Inc.	P.O. Box 3789 Midland, TX 79702-

Gerald C. Buckwalter	459 Bethel Church Road Spring City, PA 19475-9659
Gerlach Communications Holding Group Inc.	2220 Main Avenue East P.O. Box 189 West Fargo, ND 58078-
Gerwing Public Pay Phones	112-108th Avenue Coon Rapids, MN 55448-
GJG Payphones c/o Tel & Tel Payphones	4943 Harford Avenue Beltsville, MD 20705-
Global Communications	1567 Parker Boulevard Tonawanda, NY 14150-
Global Hospitality Inc.	5920 Roswell Road Suite B107-320 Atlanta, GA 30328-
Glover Communications	6006 Sherrill Road Catonsville, MD 21228-
Goalsetter Communication	13113 Beverly Overland Park, KS 66209-
Gold Coast Phones Inc.	P.O Box 16-2096 Miami, FL 33116-2096
Gold Star Communications, Inc.	11 Hobby Farm Drive Bedford, NY 10506-
Golden Restaurants	7750 N. McArthur Boulevard Suite 120-221 Irving, TX 75063-
Goldiphones	447 3rd Avenue N. #408 St. Petersburg, FL 33701-
Goodcount Communications	13840 Creekside Drive Matthews, NC 28105-

GPE Southeast, Inc.	201 N. Westshore Boulevard Tampa, FL 33609-
Graham Communications	1836 Orpheum Avenue Metairie, LA 70005-
Gratel Communications	Route 2 Box 177 Carrollton, TX 75010-
Grayson Telecomm	225 Sterling Place Brooklyn, NY 11238-
Greg Hart Communications, Inc.	880 Kent Road Batavia, OH 45103-
Greg Ralphs	Box 81 Gorman, CA 93243-
Gridiron of Memphis, LLC	711 South Dudley Memphis, TN 38104-
GSTC Inc.	67 Liberty Drive Dayton, NJ 08810-
GTI	6 Sapphire Hill Court Baltimore, MD 21209-
GTR Inc.	8671 Shadowbrook Cove Germantown, TN 38139-
Guest Communications	P.O. Box 203663 Austin, TX 78720-
Gulf South Pay Phones Service Inc.	908 West St. Mary Abbeville, LA 70510-
Harbour Payphones	1844 Fessler Street Englewood, FL 34223-
Harlan Homes LLC T/A H.P.T.	P.O. Box 469 Stevenson, MD 21153-

Harry S. Furman dba Hawk Communications	499 Grove Street Needham, MA 02492-
HAW Telecommunications	213 Lynda Lee Drive Natchez, MS 39120-2612
Haymaker Communications, Inc.	1330-21st Way South Suite 120 Birmingham, AL 35205-
Heartland Pay Phones, Inc.	P.O. Box 34606 Omaha, NE 68134-
Hena Tele Systems	161 Columbia Avenue Jersey City, NJ 07302-
Hill & Hill Service	P.O. Box 687 Monsey, NY 10952-
Hillsborough Communications Corporation	P.O. Box 273772 Tampa, FL 33688-
Holston Valley Communications	P.O. Box 1386 Abingdon, VA 24212-
Honey Farms Inc.	505 Pleasant Street Worchester, MA 01609-
Hoosier Payphone Management	13204 W. 50 S. Columbus, IN 47201-
Houston Metro Payphone	16413 Surrey Lane Magnolia, TX 77355-
Hsuzh FLP	13140 River Road Potomac, MD 20854-
HTC	218 Main Street #498 Kirkland, WA 98033-

Hughes Pay Telephones	120 Lk. Whistler Drive Auburndale, FL 33823-
Huguette Francine LEVITZ dba Manhattan Payphone Service	1745 Arlington Avenue Torrance, CA 90501-
Huron Telco Inc.	605-B W. Bay East Tawas, MI 48730-
IGD Communications, Inc.	252 Plum Drive Marlboro, NJ 07746-
IME Telecom	330 Townsend #225 San Francisco, CA 94107-
IMR Capital Corp.	103 Mechanic Street Bay E Marlborough, MA 01752-
Inatel Communications	24617 Arch Street New Hall, CA 91321-
Independent Telco Inc.	37 Burton Lane Massapequa, NY 11758-
Independent Telecommunications Co.	11213 Ridge View Terrace Fenton, MI 48430-
Indiana Payphone Company	1114 S. Kokomo Indianapolis, IN 46241-
Infinitel, Inc.	P.O. Box 49528 Sarasota, FL 34236-
Infosystems Resources, Inc.	P.O. Box 14250 Cleveland, OH 44114-
Innovative Ideas, Inc.	6305 Abiquie Place, N.E. Albuquerque, NM 87111-
Intelli-call Communications	RR 4 Box 19 B Lake Ariel, PA 18436-

Intelligent Phone Systems	5462 Jackwood Houston, TX 77096-1236
Inter-Phone Systems, Inc.	170 The Vale Syosset, NY 11791-
International Telecommunication, Inc.	123 S. 3rd Street Goshen, IN 46526-
Interwest Telecom	229 S. Wenatchee Avenue Wenatchee, WA 98801-
Island Pay Phone Systems, Inc.	P.O. Box 116 Cruz Bay St. John, USVI 00831-
J & M Specialties	2112 Cumberland Lansing, MI 48906-
J & N Communication, Inc.	1332 Commerce Avenue Bronx, NY 10461-
J & W Contracting Inc.	234 Boden Avenue Carnegie, PA 15106-
J&J Telecom	7-16 Cedar Street Fair Lawn, NJ 07410-
J&L Phone Co. Inc.	7 First Avenue Sea Girt, NJ 08750-
J&S Communication	25 Batten Avenue Blackwood, NJ 08012-
J-KM Tel-Com	9 Au Du Bon Gate Miller Place, NY 11764-
J. Miller Enterprises Inc.	2815 David Drive Metairie, LA 70003-
J.R.Y. Telecommunications	803 South Hanover Street Nanticoke, PA 18634-

JABA Inc. dba Midas Communications	612 Susquehanna Road Ambler, PA 19002-
JAC Communications	P.O. Box 1332 Mankato, MN 56002-
Jack Dunn Enterprises/ The Phone Company	P.O. Box 971 Pinckney, MI 48169-
Jack L. Hunter	2525 S. Jackson Fort Smith, AR 72901-
Jackson Communications	5 Hiawatha Jackson, TN 38305-
Jacqui Electric Company	619 Homestead Avenue Hampton, VA 23661-
James Cobb	5313 Wetherby Court Indianapolis, IN 46254-
James D. Gaberino	3614 Harvard Dallas, TX 75205-
James H. Scribner	P.O. Box 2192 San Leandro, CA 94577-
James Moran, Jr. United Telecom	853 Ocean Avenue Beachwood, NJ 08722-
Janspar Communications	1200 School Road S.E. Bessemer, AL 35022-
JAS Pay Phone Systems	104 Cloran Street Springfield, MA 01109-
Jax Payphones Inc.	121 Sir John Way Seaford, VA 23696-
Jay Telephone	P.O. Box 8304 Cherry Hill, NJ 08002-

JCW Electronics, Inc.	1301 East Corporate Drive Suite E Arlington, TX 76006-6111
JD&M Telecommunications	96 YarDarm Court Bayville, NJ 08721-
Jerold Lewis	307 Fleming Street Wausau, WI 54403-
Jerry LaQuiere Award Enterprises	14087 Old Hickory Boulevard Antioch, TN 37013-
Jerry Willey dba J&B Telecom	5951 NE 14th Road Fort Lauderdale, FL 333[illegible]4-
Jetson Enterprises	P.O. Box 172 LaCrescent, MN 55947-
JEV Communications	7616 Jamie Renee Lane North Richland Hills, TX 76180-
JFR Telecommunications	P.O. Box 728 Yonkers, NY 10704-
JG Telecom	12215 Pennybrook Court Houston, TX 77066-4322
JHR Enterprises	P.O. Box 16891 Jackson, MS 39236-
Jim Szalay Enterprises	7399 N Shadeland Avenue Suite 182 Indianapolis, IN 46250-
JLR Communications, Inc.	3508 Market Street Suite 209 Philadelphia, PA 19104-

JLW Technical Communications	1761 NW 12th Avenue Homestead, FL 33030-2935
JML Payphones	2100 Barnhill Drive Paragould, AR 72450-
John Fichera	165 Lamoka Avenue Staten Island, NY 10308-
John Fione dba Flower Vending Co. Inc.	49 Union Street Everett, MA 02149-
John Jay Rosacker dba John Jay Communications	4118 Woodbury Court North Topeka, KS 66606-
John Povich	215 North 8th Avenue Manville, NJ 08835-
John Wiser dba Cactus Telecommunications	2027 Del Oro Lane Yuma, AZ 85364-
Johnathan Cockrell dba TCO Communications	6464 Brice Dale Drive Canal Winchester, OH 43110-
Johnny Beaupre dba BC Payphones	P.O. Box 690 Agawam, MA 01001-
Jones Communications	12614 Doe Lane Lawrence, IN 46236-
Jones Pay Phone Vending Co.	P.O. Box 18936 Philadelphia, PA 19119-
Joseph Anzollitto dba Southwest Payphones Co.	304 Kendall Parkway Boerne, TX 78015-
Joseph G. Hoesch Payphones	100 Frederick Court Pittsburgh, PA 15227-
Joyce Communications	2311 Chapala Street Santa Barbara, CA 93105-

JP Phones L.L.C.	P.O. Box 70695 Chevy Chase, MD 20813-
JSL Inc.	1508 West Kersey Lane Rockville, MD 20854-
Jurious E. Robinson III dba Brandon Communications	P.O. Box 1981 Brandon, FL 33509--
JUST – TEL INC	P.O. Box 140033 Howard Beach, NY 11414-
K & D Comm.	2010 Oak Leaf Drive Portland, TX 78374-
K & G Communications, Inc.	12702 San Clemente Houston, TX 77066-
K & H Network, Inc.	4873 Big Horn Drive Old Hickory, TN 37138-
K&K Pay Phone Company	1259 Elm Avenue Glendale, CA 91205-
K-Coin	30318 Kent-Black Diamond Road Kent, WA 98042-
K-Comm. Incorporated	11340 Nancyann Way Fairfax, VA 22030-
K. S. Min	25 Rose Tree Terrace # C-9 Ridgefield, NJ 07657-
K. W. Telecom	7189 Delaware Street Riverside, CA 92504-
K.A. Vending	430 E. Jackson Spearfish, SD 57783-

K.C. Telecom Services L.L.C.	9300 E. 155th Street Kansas City, MO 64149-
K.K.W. Gold Exchange, Inc. dba Southwestern Payphones	1228 Broad Acres P.O. Box 721372 Norman, OK 73070-
K.T.S. Communication	1416 S. 80th Street Tacoma, WA 98408-
Kambiz Kafai dba Sausalito Bakery & Cafe	571 Bridgeway Sausalito, CA 94965-
KD Communications	3811 Ditmars Boulevard Suite 110A Astoria, NY 11105-
Keith's Equipment	P.O. Box 15693 Asheville, NC 28813-
KELLEE Communications Group Inc.	9100 Sepulveda Boulevard #224 Los Angeles, CA 90045-
Kells, Inc. (dba Atlantic Vending)	P.O. Box 1630 Wall, NJ 07719-
Kelly Communications Services	5840 N. West Circle Chicago, IL 60631-
Ken Damon – D&D Associates	83 Sears Road Richford, NY 13835-
Kentucky Coin Payphones	11 McAlpin Avenue Erlanger, KY 41018-
Kenworthy Pay Phones, Inc.	7374 Pinewalk Drive S. Margate, FL 33063-
Keystone Telcom, Inc.	P.O. Box 356 Glen Mills, PA 19342-

Kim & Brett Pettit	259 E. Sherbrooke Road Lindenhurst, NY 11757-
King Family, Inc.	P.O. Box 4062 Camp Verde, AZ 86322-
KiVisions	1354 Megan Drive State College, PA 16803-
KKL Vending	1108 Mayan Way Austin, TX 78733-
Know-Tone Inc.	242 S. 3rd Street West Terre Haute, IN 47885-
Knoxville Payphone Vending, LLC	1264 Rocky Hill Road Knoxville, TN 37919-
Kono Communications	19 Jefferson Avenue Watertown, MA 02472-
KR & K, Inc.	928 Shady Lane Lake Charles, LA 70605-
KTD Comm. (formerly KATSCO Comm.)	P.O. Box 173 Fortine, MT 59918-
KTD Enterprises	P.O. Box 1024 Hurst, TX 76053-
Kylo Communications	5538 N. Vagedes Fresno, CA 93711-
L&C Phone Services	190 West Camelback Phoenix, AZ 85013-
L.E. Communications	9244 East Hampton Drive #613 Capitol Heights, MD 20743-

L.W.S. Inc.	106 Tennyson Place Coppell, TX 75019-
Lake Payphones	12165 Huntoon Road Concord, OH 44077-
Lamar Phones	1490 Amy Lane Marietta, GA 30008-
Landline MGT	16701 Main Street PMB 113 Hesperia, CA 92345-7905
Larsen Communications	66628 CSAH 33 Darwin, MN 55324-
Laundry Basket	616 Woodlawn Court Hart, MI 49420-
LCI Public Communications Inc.	P.O. Box 4085 Hopkinsville, KY 42241-4085
LCT Long Distance, Inc. dba LCC Payphones	P.O. Box 151420 Lufkin, TX 75915-1420
LCV, Inc.	P.O. Box 301 Lorain, OH 44052-
LDHG Telecomm.	P.O. Box 517 Somerville, TX 77879-
Leader In New Communication, Inc.	5716 Cricket Ridge Indianapolis, IN 46250-
Lemons Communications	682 Saw Creek East Bushkill, PA 18324-
Leonard Bertyn	18543 Parklane Drive Livonia, MI 48152-

Liberty Bell	P.O. Box 6067 Charlottesvillle, VA 22906-
Liberty Payphones Inc.	79 Islands Drive Midway, GA 31320-
Liberty Tel Inc.	120 N.W. 154th Street P.O. Box 640338 Miami, FL 33169-
Liberty, Inc.	P.O. Box 126 Saline, MI 48176-
Lifeline Communications	One Robert Lane Glen Head, NY 11545-
Lighthouse Communications	P.O. Box 154 Waban, MA 02468-
Lighthouse Communications, LLC	739 Ontario Street P.O. Box 244 Havre De Grace, MD 21078-
Lightning Telecom	1724 LaForest Avenue Safety Harbor, FL 34695-
Lindeman Communications	1005 Michel Drive Aurora, MO 65605-
LinderPhone	39 Stonyhill Path Smithtown, NY 11787-
Link-Tech, Inc.	P.O. Box 40 Monmouth Beach, NJ 07750-
Linkous Communications Co.	443 Britton Lane Monroe, OH 45050-
LLC Inc./Tampa Payphones	P.O. Box 16966 Tampa, FL 33687-6966

Lloyd Anderson Electrical, Inc.	560 E. Hickory Street Lindsay, CA 93247-
Logatel	12506 Verdin Street, NW Andover, MN 55304-
Long Distance Communications, Inc.	928 Shady Lane Lake Charles, LA 70601-
Long Island Telecommunications Co., Inc.	12 Sixth Avenue Smithtown, NY 11787-
Longtell Communication LLC	5201 Wildhorse Court Arlington, TX 76017-
Louis J. Crispi T/A Liberty Phones	P.O. Box 500 Williamstown, NJ 08094-
LTT Entertainment dba Country Public Phones	9 Farm Meadows Road Columbia, NJ 07832-
Lucy Belle	21 Vickies Place Millington, NJ 07946-
Lund Communications	981 Garlenda Avenue SW Palm Bay, FL 32908-
Lynn E. Maxwell, Jr.	1933 Arrowhead Drive N.E. St. Petersburg, FL 33703-
Lynn Wilcoxson dba L&L Pay Phones	15743 Romar Street North Hills, CA 91343-
Lyst Enterprises, Inc.	1550 N.W. LeJeune Road Miami, FL 33126-
M & A Phone Group	3536 Riva Road Davidsonville, MD 21035-
M & M Pay Phones, Inc.	8949 Wuest Road Cincinnati, OH 45251-

M & W Associates Inc.	1800 Red Cloud Road Longmont, CO 80501-
M Phone	3800 Farrington Mesquite, TX 75150-
M&M Communications	23852 Pacific Coast Hwy #127 Malibu, CA 90265-
M&M Telecommunications Inc.	219 Vermont Avenue Oceanside, NY 11572-
M.S.S. Vending Inc.	65 Passaic Avenue Kearny, NJ 07032-
MAC Communications	6210 Zinfandel Drive Suwanee, GA 30024-
Mactel Communications LLC	P.O. Box 171751 Arlington, TX 76003-1751
Magic Dragon Farms, Inc.	503 North Causeway #501 New Smyma Beach, FL 32169-
MAH Communications Inc.	151 Kalmus Drive Suite J-7 Costa Mesa, CA 92626-
MAH Communications Inc. 2	17403 Village Green Drive Houston, TX 77040-
Mahan Grocery	P.O. Box 1709 Tunica, MS 38676-
Manhattan Payphone Service	1745 Arlington Avenue Torrance, CA 90501-
Manny's Tel. Systems Inc.	1274 E. 27th Street Brooklyn, NY 11210-

Marc Whitelaw dba Action Video & Vending	463 Woodland Drive Buffalo, NY 14223-
Maria E. Delgado dba Global Communication	4020 B Cortez Drive Tampa, FL 33614-
Mark Blashaw dba Blayco Payphones	667 John Oakley Road Prospect Hill, NC 27314-
Mark Held	703A Harwood Court Mt. Laurel, NJ 08054-
Mascom Inc.	33 Ranick Road Hauppauge, NY 11788-
Mason's Communication	7810 E. Devonshire Road Muncie, IN 47302-
MB Communications, Inc.	54 Amelia Avenue Livingston, NJ 07039-
MB Phones	34 Galvaston Loop Staten Island, NY 10314-
MB&E Telecom	5292 Rebel Road Marietta, GA 30068-
MB2, Inc	14621 S.W. 148 Avenue Miami, FL 33146-
MBE Coin Phone	25 Featherbed Lane Derry, NH 03038-
MC Services	5200 NE 289th Street Battle Ground, WA 98604-
MC Trading & Assoc. Inc.	18658 N.W. 77th Place Miami, FL 33015-
MCF Communications, Inc.	769 Flowers Crossing Lawrenceville, GA 30044-

MCL Communications	P.O. Box 2401 Palm Harbor, FL 34682-
Mega Communications, Inc.	701 Dahlia Street N.W. Washington, DC 20012-
Mel McQuain Communications	2010 Pineway Road Martinsburg, WV 25401-
Mel-Tel Inc.	4937 Hearst Street Suite 1 H Metairie, LA 70001-
Melanie Hodgin dba Palmetto Payphones	P.O. Box 61 Gaston, SC 29053-
Melo-Tone Vending c/o Cointel Inc.	130 Broadway Somerville, MA 02145-
Memory Pay Phones	701 16th Avenue Phenix City, AL 36869-
Meridian Telecommunications, Inc.	P.O. Box 423247 Kissimmee, FL 34742-3247
Metro Coin Systems	P.O. Box 785 East Northport, NY 11731-
Metro Communications Mgmt.	17073 Eidelweiss Street Andover, MN 55304-
Metro Tel Inc.	55 Canal Street Staten Island, NY 10304-
Metro Telecom	P.O. Box 35483 Canton, OH 44735-
Metro Telecommunication	240 Chastain Manor Drive Norcross, GA 30071-
Metro Vending of Arizona	P.O. Box 28237 Tempe, AZ 85285-

Metrophone Telecommunications, Inc.	2020-124th Avenue, N.E. Suite C-103 Bellevue, WA 98005-
MetroTel LLC	200 Thornhill Circle Double Oak, TX 75067-
Micam Communication Services	3903 City Avenue #E-719 Philadelphia, PA 19131-
Michael DiNardo	329 Mayfield Avenue Elkins Park, PA 19027-
Michael J. Cooper	4922 S.W. 148th Place Miami, FL 33185-
Michael J. Hofbauer/ Northern Telecom	9 Spindletop Lane Willingboro, NJ 08046-
Michigan Paytel Inc.	30800 Telegraph Suite 2930 Bingham Farms, MI 48025-
Michigan Public Tel Co	6211 Mead Dearborn, MI 48126-
Michigan's Communication Co.	12140 McPherson Lowe, MI 49331-
Miclane PayPhone, Inc.	739 Woodlyn Drive Langhorne, PA 19053-
Mid Atlantic Telecom Inc.	13908 Lee Jackson Highway Suite 322 Chantilly, VA 20151-3202
Mid Atlantic Telephone	700 Russell Avenue Douglassville, PA 19518-
Mid-Cal Payphones	P.O. Box 3955 San Luis Obispo, CA 93403-

Mid-Minnesota Vend-A-Fon	18-Third Avenue, North Cold Spring, MN 56320-1617
Middtel Communications	611 Tara Oaks Drive Middleton, OH 45042-
Midessa Communications	3402 WCR 184 Midland, TX 79706-
Midwest Autotel Services, Inc.	3160 Haggerty Road Suite J West Bloomfield, MI 48323-
Midwest Communications Services Inc.	1715 Village Court Crystal Lake, IL 60014-
Midwest Communications, Inc.	P.O. Box 602 Muskogee, OK 74402-
Midwest Telecommunications	516 North Cass Street Berrien Springs, MI 49103-
Midwest Telephone Supply	402 North B Street Fairfield, IA 52556-
Miguel Haddad	9101 W Okeechobee Road Hialeah Gardens, FL 33018-
Mike Wiemicki dba D&M Communications	175 Federal Way Lancaster, PA 17601-
Miller Telecom	16805 – 12th Avenue N. Plymouth, MN 55447-
Miracle Industries Inc. dba Pennsylvania Pay Telephone	233 Mickley Road Whitehall, PA 18052-
Miriam Elkins	P.O. Box 700937 St. Cloud, FL 34470-0937

Mississippi Telecommunications, Inc.	P.O. Box 768 Brandon, MS 39043-
MNK Communications Inc.	P.O. Box 610140 Bayside, NY 11361-0140
Modern Pay Phone, Inc.	19 Ladwood Drive Holmdel, NJ 07733-
Modern Telephone Co. Inc.	318 St. Andrews Road Walden, NY 12586-
Mon's Phones	14029 E. Trumball Street Whittier, CA 90604-
Money Makers	P.O. Box 101271 Nashville, TN 37224-
Monjid Hamdan dba Boston Telecom	45 Grand Street #434 Worcester, MA 01610-
Morse Communications Network	P.O. Box 320201 San Francisco, CA 94132-
Mountain Communication	P.O. Box 492753 Redding, CA 96049-
Mountain Payphone	102 Mule Shed Lane Richmond, KY 40475-
Mountain Paytel	P.O. Box 310 Stevensville, MT 59870-
Mountain Phone Co. West	6065 Corporal Lane Boise, ID 83704-
Mountain Phone Company	P.O. Box 2369 Ketchum, ID 83340-
Mountain Telecom, Inc.	P.O. Box 340 Glenwood Springs, CO 81602-

MSC National, Inc.	555 63rd Street Brooklyn, NY 11220-
MSM Communications, Inc.	616 Broadway Columbus, GA 31901-
MTC Telecom, Inc.	281 E. Social Row Road Centerville, OH 45458-
MTG Communications, Inc.	Box A79A RR #4 Moravia, NY 13118-
MTS/Communicall	13455 Noel Road #1000 Dallas, TX 75240-
Mullis Vending	RR2 Box 398 Tell City, IN 47586-9634
Murray Communications	3380 Oak Forest Drive Green Bay, WI 54313-
MXC Inc.	520 SE 12th Street #101 Dania, FL 33004-
Mystic Group, Ltd.	610 Avenue De Diego Puerto Nuevo San Juan, Puerto Rico 00920-
N-Tel Communications Inc.	Route 2 Box 140 A Clifton, TX 76634-
N.B.C. Communication	243 Orchid Road Levittown, NY 11756-
N.Y. Consolidated Telephones, Inc.	8782-26th Avenue Brooklyn, NY 11214-
N.Y. Telecomm, Inc.	86-34 Francis Lewis Boulevard Holliswood, NY 11427-

Natcom Inc.	P.O. Box 818 Troy, MI 48099-
National Brands, Inc.	4633 West Polk Street Phoenix, AZ 85043-
National Candy & Toy, Inc.	4800 N. Federal Highway D-105 Boca Raton, FL 33431-
National Electric & Telephone, Inc.	615 Sands Court Coatesville, PA 19320-
National PayPhone Supply	3133 W. Alameda Denver, CO 80219-
National Payphones Co., Inc.	P.O. Box 1507 Humble, TX 77347-1507
National Public Phone Co.	8200 E. Pacific Place Suite 409 Denver, CO 80231-
National Telcom, Inc.	413 N. Center Street Statesville, NC 28677-
National Telecoin	600 N. 4th Street Philadelphia, PA 19123-
National Telecom, Inc.	4416 Moosewood Drive Virginia Beach, VA 23462-
National Toll Call	1160 Tranter Avenue Pittsburgh, PA 15220-
Nationwide Communications, Inc.	2333 Commercial Road Auburn Hills, MI 48326-
Nationwide Payphone Corp.	157 N.W. 94 Way Coral Springs, FL 33071-

Nau-Tech Telecommunications	925 S. Mason #216 Katy, TX 77450-
Nea Telecom	101 East Forrest Jonesboro, AR 72401-
Need A Phone Co.	188 W. Wingohocking Street Philadelphia, PA 19140-
Neil Carlisle	582 La Jardin Edgewater, FL 32141-
Neil Cohen – NBC Com.	243 Orchid Road Levittown, NY 11756-
NevCom Communications, Inc.	343 4th Avenue Lake Placid, FL 33852-
New England Payphone, Inc.	82 Herbert Street #1 Framingham, MA 01702-
New Jersey Pay-Phone Corp.	RR4 10 Higgins Drive Vernon, NJ 07462-
New Market Communication	7951 67 Street North Pinellas Park, FL 33781-
New York City Telecommunications Company, Inc.	555 63rd Street Brooklyn, NY 11220-
New York Pay Phone Systems, Inc.	1252 Saratoga Road Ballston Spa, NY 12020-
New York Payphone Systems	1252 Saratoga Road Ballston Spa, NY 12020-
New York Telcoin, Inc.	34-41 83rd Street Jackson Heights, NY 11372-
Newtel	P.O. Box 273 Stratford, CT 06615-

Nexus Consolidated Industries Inc. dba Nexus Payphones	33 Ranick Road Hauppauge, NY 11788-4208
Nicholas Oslander dba G.G.P.S.	346 Washington Street #245 Braintree, MA 02184-4702
Nick's Amusements	2700 Annapolis Road Baltimore, MD 21230-
Nickea Communication	3667 N. Dodge Tucson, AZ 85718-
Nickel Payphone Inc	P.O. Box 512 Commack, NY 11725-
Nicour, Ltd.	6300 Ridglea Place Suite 1104 Fort Worth, TX 76116-
Ninetel Communications	2371 East 24th Street Brooklyn, NY 11229-4918
Nizhoni Communications	P.O. Box 3958 Page, AZ 86040-
No Bell	P.O. Box 1615 Cedar Ridge, CA 95924-
Noble Telecommunications	P.O. Box 1664 New Rochelle, NY 10802-
Norman Arkin Pay Phones (Sun Valley Comm.)	9221 E. Palm Tree Drive Tucson, AZ 85710-
Norman D. Masselli	24479 US Hwy. 19 N. #620 Clearwater, FL 33763-
Norman Wilson	536 Howard Road Cherry Hill, NJ 08034-

Nortel Payphones Inc.	188 Jefferson Street Suite 156 Newark, NJ 07105-
Nortelco Inc. dba Diversified Service Co.	P.O. Box 3823 Spokane, WA 99220-
North American Interstate, Inc.	3800 W. Eleven Mile Road Berkley, MI 48072-
North American Public Communications	999 West Troy Avenue Indianapolis, IN 46225-
North East Public Phones Inc.	1358 Hooper Avenue Suite 276 Toms River, NJ 08753-
North Shore Telecommunications	4830 Tremont Drive Allison Park, PA 15101-
North South Telecom, Inc.	4721 McAlpine Road Charlotte, NC 28226-
North Texas Pay Phone, Inc.	1361 W. Euless Boulevard #107 Euless, TX 76040-
Northeast Telephone, Inc.	25 Stewart Street Floral Park, NY 11001-
Northern California Telephone	775 E. Blithedale Avenue #385 Mill Valley, CA 94941-
Northern Colorado Telecom	1906 13th Street #206 Boulder, CO 80302-
Northern Telephone	N10459 Pine Shore Lane Tomahawk, WI 54487-
Northern Telephone, Inc.	P.O. Box 1449 Wausau, WI 54402-1449

Northgate Telephone Corporation	100 Squire Road Revere, MA 02151-
Northwest Communications	670 W. 7th Street St. Paul, MN 55102-
Northwest Telephone Inc.	P.O. Box 3012 Boise, ID 83703-
Norwest Communications	401 East Stonewall Spokane, WA 99208-5781
Notae Inc.	P.O. Box 1547 Nokomis, FL 34275-
Nu Tel Systems, Inc.	14444 Rosefinch Circle Leesburg, VA 20176-
NY Paytel	P.O. Box 672 Yonkers, NY 10704-
NYPAT, Inc.	7616 Monarch Court Delray Beach, FL 33446-
NYPay Hospital Comm. Corp.	P.O. Box 1189 Great Neck, NY 11023-
Nytel Communications, Inc.	80-16 193 Street Jamaica, NY 11423-
O.A.P.I. Inc. AKA Own-A-Phone, Inc. – 10847	9920 S. LaCienega Boulevard #507 Inglewood, CA 90301-
O.A.P.I. Inc. AKA Own-A-Phone, Inc. – 12241	9920 S. LaCienega Boulevard #507 Inglewood, CA 92264-
Ocracoke Telephone Co.	7038 Central Avenue Suite B St. Petersburg, FL 33707-

Off The Hook Payphone	P.O. Box 3767 Paso Robles, CA 93447-
Ohio Public Tel Co	6211 Mead Dearborn, MI 48126-
Oliver Company	P.O. Box 4647 Austin, TX 78765-
Oliver Oliver Communications	4131 Shoreline Drive Dallas, TX 75233-
Omar Rasheed	11051 Knights Road Philadelphia, PA 19154-
Omega Communications	7137 East 32nd Place Tucson, AZ 85710-
Omega Payphones	645 Woodland Road Canonsburg, PA 15317-
One Touch Payphones	2807 Farmdale Road Akron, OH 44312-
Online Payphones Inc.	22343 East La Palma Avenue Suite 114 Yorba Linda, CA 92887-
Option Pay Phones	P.O. Box 2281 Harker Heights, TX 76548-
Owens Communications Co.	1304 Valley Road Yukon, OK 73099-
Owens TeleCom Service	3224 Mid Dale Lane Louisville, KY 40220-
P&D Telecommunications, Inc.	3000 Country Way Road Antioch, TN 37103-

P&E Enterprises	4817 Parris Bridge Road Boiling Springs, SC 29316-5921
P&M Pay Phone Service	25885 Village Green Boulevard Apt. 208 Harrison Township, MI 48045-
Pac West of Nevada	1670 Mackland Avenue Minden, NV 89423-
Paca-Tel Pay Phones, Inc.	30 Jericho Turnpike Suite 112 Commack, NY 11725-
Pacific Northwest Payphones	1315 NW 185th #215 Beaverton, OR 97006-
Pacific Payphone	154 Deerglen Circle Vacaville, CA 95687-
PAJ Communications	1026 Hollenbeck Avenue Sunnyvale, CA 94087-
Palcom Systems, Inc.	P.O. Box 1266 Marietta, GA 30061-
Paracom Inc.	1101 Andover Park West Tukwila, WA 98188-
Parallel Foundation Inc.	251 Creekside Drive St. Augustine, FL 32086-
Paramount Payphone Eastern LLC	P.O. Box 1937 Brandon, FL 33509-
Paramount Payphone, Inc.	1411 S.W. 31st Avenue Pompano Beach, FL 33069-
Park City Telephone	P.O. Box 3974 Park City, UT 84060-

Path Enterprises Inc.	P.O. Box 976 South Orange, NJ 07079-0976
Paul Gilli Communications	10301 Jims Trail Rogers, AR 72756-
Pay Com Inc.	P.O. Box 90 Siloam, NC 27047-
Pay Fone Plus	2415 Swinging Way Court Evansville, IN 47711-
Pay Phone Concepts	1310 W. Ash Junction City, KS 66441-
Pay Phone Consultants	Route 2 Box Box 79A Point, TX 75472-
Pay Phone One Inc	2225 Caniff Hamtramck, MI 48212-
Pay Phone Partners, Inc.	1100 East Morehead Street Suite 100 Charlotte, NC 28204-
Pay Phone Services, Inc.	P.O. Box 848 DeSoto, TX 75123-
Pay Phone Xchange, L.L.C.	6267 S. Elmira Circle E. Englewood, CO 80111-
Pay Phones Plus	P.O. Box 397 Black Earth, WI 53515-
Pay Tel Communications	15 Manning Drive West Gardiner, ME 04345-
Pay Tel Communications, Inc.	P.O. Box 8179 Greensboro, NC 27419-

Pay Telephone Vending Co.	850 W Mission Suite B-58 Ontario, CA 91762-
Pay-Tel Communications	6116 N Central Expressway Suite 200 Dallas, TX 75206-
Pay-Tel Corp.	45 W. Tupper St Buffalo, NY 14202-
Pay-Tel International	2121 Hillside Avenue Suite 250 New Hyde Park, NY 11040-
Pay-tel Services Inc.	6660 SW 41 Place Davie, FL 33314-
Payphone Advertising Media, Inc.	P.O. Box 07478 Fort Myers, FL 33919-
Payphone Commissions Co., Inc.	4937 Hearst Street Suite 1-H Metairie, LA 70001-
Payphone Commissions/ Payphone Connections Partnership	4937 Hearst Street Suite 1-H Metairie, LA 70001-
Payphone Connection	P.O. Box 40 Grenloch, NJ 08032-
Payphone Consultants Inc.	10501 NW 50th Street Suite 107 Sunrise, FL 33351-
PayPhone Express	20 South Main Street Carbondale, PA 18407-
Payphone In-Tel-Lect Network	203 Dogwood Trail Magnolia, TX 77354-

PayPhone LLC	1106 N. Main Street Providence, RI 02908-
Payphone Professionals	P.O. Box 654 Dana Point, CA 92629-0654
PayPhone Services Inc.	704 Browning Avenue Somerdale, NJ 08083-
Payphone Systems, Inc.	116 Race Street Holyoke, MA 01040-
Payphone Vending Service, Inc.	P.O. Box 637 Lake Charles, LA 70602-
Payphones Inc.	4937 Hearst Street Suite 1-H Metairie, LA 70001-
Payphones of America No.	420 Barons Road Springfield, IL 62704-
PayPhones of Arkansas, LLC formerly DeVore Communications	P.O. Box 3222 Russellville, AR 72811-
Payphones of S.E. LLC	3726 Cedarwood Drive Nashville, TN 37216-
Payphones Plus Inc.	1635 E. Redfield Road Tempe, AZ 85283-
PayPhones Unlimited, Inc.	221 E. 2nd Street Davenport, IA 52801-
Payphones USA Inc.	79 N Hibiscus Drive Miami Beach, FL 33139-
Payphones, Inc.	3001 Bounty Lane St. James City, FL 33956-

Paytel Communications	1463 Mercury Drive #121 Schaumburg, IL 60193-
PayTel Communications Systems, Inc.	200 W. Cecil Street Neenah, WI 54956-
Paytel Inc.	320 N 291 Hwy Suite A Liberty, MO 64068-
Paytel USA, Inc.	1303 Brighton Way Lakeland, FL 33813-
Paytel, Inc.	2333 Commercial Road Auburn Hills, MI 48326-
Paytelco	256 Spring Road Peterborough, NH 03458-
PayTelephone of Florida, Inc.	6501 Spyglass Lane Bradenton, FL 34202-
Paytell Corp.	16 Cedar Drive Massapequa, NY 11758-
Pecal Communications, Inc.	1026 South 31st Street Temple, TX 76504-
Pembroke Communications	6314 Trail Boulevard Naples, FL 34108-
Pen-Tel Communications, Inc.	42 Rosemary Place East Islip, NY 11730-
Penn Boys Legend Telecom, Inc.	P.O. Box 3661 Hollywood, FL 33083-
Penn Tel	P.O. Box 1756 West Chester, PA 19380-
Penn Telephone Systems	304 Camer Drive Bensalem, PA 19020-

Penn Triple S	304 Camer Drive Bensalem, PA 19020-
Peoples Telephone Company Inc.	2300 N.W. 89th Place Miami, FL 33172-
Perlow Steel	2900 S. 25th Avenue Broadview, IL 60153-
Phone Management, Inc.	396 Washington Avenue Carlstadt, NJ 07072-
Phone Tech Inc.	280 Lincoln Boulevard Middlesex, NJ 08846-
Phones R Us	2001 Cypress Lane Cedar Park, TX 78613-
Phones Unlimited Inc.	Route 5 Box 116 A Marietta, OH 45750-
PhoneTech Communications	214 Fairbanks Houston, TX 77009-
PhoneTel Technologies	1001 Lakeside Avenue Cleveland, OH 44114-1195
Phonewiser, Inc.	263 Spear Road Peachtree City, GA 30269-
PhoneWorks	P.O. Box 2745 Elk Grove, CA 95759-
Piedmont Communication, Inc.	7356 Terrace Drive Charlotte, NC 28211-
Piedmont Payphone Co.	Box 153 Landis, NC 28088-
Pilot Communications	735 Wickerberry Knoll Roswell, GA 30076-

Pinnacle PayPhones	1801 Northcrest Drive Plano, TX 75075-
PMC, Ltd AKA PayPhone Monitoring Co.	P.O. Box 812 Lake Zurich, IL 60047-
PMP of Minnesota	P.O. Box 98 Waverly, MN 55390-
Prairie Payphones	841 Meadow Station Circle Parker, CO 80138-
Precision Pay Phone Inc.	P.O. Box 292546 Lewisville, TX 75029-
Premier Payphone Services, Inc.	134 State Street Bowling Green, KY 42101-
Premiere Enterprise Corp.	P.O. Box 970437 Ypsilanti, MI 49187-
Prescom	430 Dogwood Trail Kernersville, NC 27284-
Princess Payphones, LLC aka American Online	6965 El Camino Real Suite 105-223 Carlsbad, CA 92009-
Print Tel Communications	Route 1 Box 231 F Douglas, AZ 85607-
Private Pay Phones	4937 Hearst Street Suite 1-H Metairie, LA 70001-
Privately Owned Pay Phones, Inc.	1593 Hollywood Drive Lancaster, PA 17601-5263
Pro Telecom, Inc.	P.O. Box 1440 Panacea, FL 32346-

ProCom Management Corp.	W6246 Cty. Trk. BB Suite B Appleton, WI 54915-
ProComm Inc.	P.O. Box 681771 Franklin, TN 37068-
Professional Payphones	P.O. Box 302817 St. Thomas, USVI 00803-
Profit - Tel of Colorado	1 Morning Dove Lane Littleton, CO 80127-
Profitable Payphones	8119 E. Del Joya Drive Scottsdale, AZ 85258-
Progressive Controls, Inc.	1100 River Lane Loves Park, IL 61111-
Protocom Tel	20025 Bue Rund Loop Poulsbo, WA 98370-
Providence Telesys, Inc.	7282 55th Avenue East Suite 130 Bradenton, FL 34203-
Public Communication Management, Inc.	175 5th Avenue Suite 2168 New York, NY 10010-
Public Communications of America, Inc.	864 Willis Avenue Albertson, NY 11507-
Public Pay Phone Systems	2001 Royalwood Drive Arlington, TX 76006-
Public Pay Telephone, Inc.	46 East Hyde Park St. Joseph, MO 64504-
Public Payphone Co.	2101 Richland Avenue #1 Metairie, LA 70001-

Public Telcom Inc.	252 Lenox Avenue Long Branch, NJ 07740-
Public Telecom	12629 N. Tatum Boulevard #183 Phoenix, AZ 85032-
Public Telephone, Inc.	789 E. 8375 S. Sandy, UT 84094-
Public Telephones, Inc.	P.O. Box 976 South Orange, NJ 07079-0976
PubliComm Plus	2636 Bent Tree Drive Hurst, TX 76054-
PubPhone Inc.	P.O. Box 4482 Shreveport, LA 71134-
Pulham Communications	5036 Dover Street N.E. St. Petersburg, FL 33703-
PykaTel, Inc.	P.O. Box 162 Kannapolis, NC 28082-0162
Q-3 Telecom, Inc. AKA Texas O.A.P. Inc. – 10850	3400 East Tahquitz Canyon Way B229 Palm Springs, CA 92262-
Q-3 Telecom, Inc. AKA Texas O.A.P. Inc. – 11409	3400 East Tahquitz Canyon Way B229 Palm Springs, CA 92262-
Q-3 Telecom, Inc. AKA Texas O.A.P. Inc. – 12871	3400 East Tahquitz Canyon Way B229 Palm Springs, CA 92262-
Q-3 Telecom, Inc. AKA Texas O.A.P. Inc. – 15096	3400 East Tahquitz Canyon Way B229 Palm Springs, CA 92262-

QNSI Telephone Co.	1110 W. Kettleman Lane #48 Lodi, CA 95241-1100
QTC, Inc.	3931 Central Avenue Louisville, KY 40218-
Qualitel Communications, Inc.	4004 Ross Avenue Dallas, TX 75204-
Quality Communication Services, Inc.	3585 Forest Edge Drive Conyers, GA 30094-
Quality Payphones	9103 West 131st Place Overland Park, KS 66213-
Quantum Telecom LLC	145 E. Delilah Road Pleasantville, NJ 08232-
Quarter Call of Georgia	696 Reely Road La Grange, GA 30240-
Quarter Time Communication	3931 Central Avenue Louisville, KY 40218-
Quarters Vending	1269 Nottingham Square Bolivar, OH 44612-
R & E Payphones, Inc.	422 SpringMill Avenue Conshohocken, PA 19428-
R & S Enterprises	2303 Marcia Drive Bellbrook, OH 45305-
R & T West Communications	4802 N. Main Road Rockford, IL 61103-
R B Communications	10940 Blue Sky Drive Haslet, TX 76052-
R H Pay Phones	3716 Amarillo Drive Harrisburg, NC 28075-

R&B Communications	103 Northgate Park Ringwood, NJ 07456-
R&B Communications, Inc.	109 Poningo Street Port Chester, NY 10573-
R&R Telcom a Division of Rieger Ent., Inc.	1110 McKinley Avenue San Antonio, TX 78210-
R&T Communication System, Inc.	P.O. Box 897 Goose Creek, SC 29445-
R.L. Communications Inc.	7355 N. 8th Street Phoenix, AZ 85020-
R.W. Lovejoy, Inc.	5352 Jackman Road Toledo, OH 43613-
Rainbow Communications Corp.	4816 Beechnut Drive St. Joseph, MI 49085-
Ralph Russo/R&R Communications	1713 77th Street Brooklyn, NY 11214-
Ram Telecom, Inc.	2188 Connolly Troy, MI 48098-
Ramon G. Castillo dba Castle Telecomm.	8084 NW 10th Street Apt. 5 Miami, FL 33126-
RaVar Inc.	P.O. Box 601641 North Miami Beach, FL 33160-
Ray Phones	5228 River Oaks Corpus Christi, TX 78413-
Rayford Poole Electronics	P.O. Box 824 4554 Highway 13 North Alto, GA 30510-

Raymond O. Yauchler	10935 51st Avenue, North St. Petersburg, FL 33708-
RB Communications	P.O. Box 137 Douglas, WY 82633-
RCA Phones	Box 419 Bethesda, OH 43719-
Reliable Communications	P.O. Box 83 Umpire, AR 71971-
Reliable Payphones, Inc.	901 E. 18th Street Plano, TX 75074-
Reliable Telephone Company, LLC	10151 University Boulevard Suite 239 Orlando, FL 32817-
ReLiaTel International Inc.	69-01 35th Avenue #4E Woodside, NY 11377-
Resource Payphone, Inc.	3800 W. Eleven Mile Road Berkley, MI 48072-
Revenue Communications, Inc.	202 North Allen Drive # E Allen, TX 75013-
Reynolds Corp/Reyntel Communications	400 Andrews Street Suite 405 Rochester, NY 14604-
RF Tel	77 Elmont Place Colonia, NJ 07067-
Rftel (Frank Ruisi)	77 Elmont Place Colonia, NJ 07067-
RHI Telecom, Inc.	2 Boyard Court Somerset, NJ 08873-

Richard M. Klein dba ECI	252 Lookout Place Radnor, PA 19087-
Richard Montoya	1612 Connie Avenue Copperas Cove, TX 76522-
Rightcall Communications, Inc.	15223 Herriman Boulevard Suite 3 Noblesville, IN 46060-
Riteline Communications	14082 SW 139 Court Miami, FL 33186-
River City Pay Phones	1020 Larkspur Loop Jacksonville, FL 32259-
Riviera Hotel and Casino	2901 Las Vegas Boulevard South Las Vegas, NV 89109-
RJE Enterprises, Inc.	4992 Georgetown Court Clarkston, MI 48346-
RMES Communications, Inc.	1580 Lincoln Street Suite 1125 Denver, CO 80203-
Ro-Lo Telephone Inc.	16-37 163 Street Whitestone, NY 11357-
Ro-Tel Payphones	19531 Marigold Street N.W. Oak Grove, MN 55303
Roanoke Valley Telephone Co.	121 Washington Avenue Weldon, NC 27890-
Robert Carter	P.O. Box 2998 Lake Placid, FL 33862-
Robert Giordano d/b/a Arrow Communications	43 Safford Street North Quincy, MA 02171-

Robert Holeman	37 Hubbard Avenue Box 72 Riverhead, NY 11901-
Robert Maxwell	225 Lincoln Avenue Evanston, WY 82930-
Robert Nicoleau	866 Shubert Street Baldwin, NY 11510-
Robert Shields Enterprises Inc	6779 Engle Road Suite L Middleburg Heights, OH 44130-
Robin Technologies, Inc.	12156 Parklawn Drive Rockville, MD 20852-
Rockower Enterprises, Inc.	3135 Alpin Drive Dresher, PA 19025-
Rocky Mountain Communications, Inc.	P.O. Box 1162 Boise, ID 83701-
Rod Trowbridge dba Advanced Communications	8405 Ida Haysville, KS 67060-
Rodriguez & Flores	5330 East River Road West Henrietta, NY 14586-
Ron Kain/K.C.S. Communication	144 Coral Vine Drive Naples, FL 34140-
Ronald Wilson dba Ronson Payphones	5866 S. Staples Suite 330 Corpus Christi, TX 78413-
Rosebud Cotton Company	P.O. Box 597 Rosebud, TX 76570-
Roth Communications, Inc.	418 Sorapam Street New Orleans, LA 70130-
Roy Federman dba RMF Telecom	4346 North 91st Street Milwaukee, WI 53222-

RT Phone Systems LLC	Route 1 Box 262 Bruceton Mills, WV 26525-
RTI Telecom	P.O. Box 439 Midway, UT 84049-
Russell Niemi d/b/a Lakes Public Telephone Co.	P.O. Box 736 Union Lake, MI 48387-
RWP Communications	11260 Park Street Cerritos, CA 90703-
Rys Management Group	6330 Heidler Road Fairview, PA 16415-
S & R TeleComm	P.O. Box 11576 St. Thomas, USVI 00801-
S&B Telephones	6700 Fallbrook #180 West Hills, CA 91307-
S&C Enterprises	P.O. Box 4431 Huntsville, AL 35815-
S/S Pay Tel	53 Stratford Drive Manalapan, NJ 07726-
Samco Communications	8724 Southwind Drive Memphis, TN 38125-
Sanderson Security & Communication Inc.	P.O. Box 6686 San Rafael, CA 94903-
Sassan Kouchekpour	P.O. Box 2965 Mission Viejo, CA 92690-
SC Telephone Communications	1011 S. Washington Avenue Fayetteville, AR 72701-
Scarborough Enterprises Inc.	17060 Old Jonesboro Road Bristol, VA 24202-

Schmidt's Communications	P.O. Box 80415 Canton, OH 44708-0415
Scott Communications	8318 Pineville-Matthews Road Suite 708 Charlotte, NC 28226-
Sea Communications	345 Main Street Simpson, PA 18407-
Seven Pines Communications	P.O. Box 27 Stilwell, OK 74960-
Sherif Ahmed	80 Avenue O Brooklyn, NY 11204-
Shoretel LLC	145 E. Delilah Road Pleasantville, NJ 08232-
Siegel Satellite & TV Inc. d/b/a Advanced Pay Phone	7581 Brandt Pk. Huber Heights, OH 45424-
Sierra Tele-Comm	P.O. Box 766 Clovis, CA 93613-
Silver Phones	101 Lenox Avenue Pittsburgh, PA 15221-
Silver Telcom	18 Sycamore Drive NorthEast, MD 21901-
Siningers Enterprises	1115 Dakota Avenue South Sioux City, NE 68776-
SKYTALKWEST Telecom LLC	P.O. Box 1449 Wausau, WI 54402-1449
SLD Realty	1010 Rennie Lake Road Traverse City, MI 49686-
Small Enterprise Development	20410 Settlers Valley San Antonio, TX 78258-

Smart Phones Bloom Vending	4100 Amberfield Circle Norcross, GA 30092-
Smart-Tel, Inc./ Liberty Telephone	P.O. Box 47025 Phoenix, AZ 85068-
SMI Communications Inc.	303 West Nepessing Street P.O. Box 428 Lapeer, MI 48446-
Snidermen & Associates Inc. DBA Telechek	4310 Boca Bay Dallas, TX 75244-
Snow Country Communications	1470 Shaw Mansion Road Waterbury Ctr, VT 05677-
Snowbelt Communications	1030 Indiana Avenue LaPorte, IN 46350-
Son Tec, Inc.	3420 East Walmont Jackson, MI 49203-
Son-Ter Communications	1803 Crenshaw Drive Dothan, AL 36301-
Sonil Communication Inc.	717 Palmer Drive Herndon, VA 20170-
Sooner Payphones	10851 E. 33rd Street Tulsa, OK 74146-
Sooner Telecommunications, Inc.	5408 Grasmere Plano, TX 75093-
South Florida Advanced Comm., Inc.	520 SE 12th Street # 101 Dania, FL 33004-
South Miami Wash Bowl, Inc.	522 San Esteban Avenue Coral Gables, FL 33146-
South Texas Metrocom	10303 Country Vista San Antonio, TX 78240-

SouthCom Communications	13 Sabrina Court Hanahan, SC 29406-
Southeast Pay Telephone, Inc.	1393 S.W. 12 Avenue Pompano Beach, FL 33069-
SouthEastern Telephone Service	4045 Sheridan Avenue Suite 394 Miami Beach, FL 33140-
Southern Communication	P.O. Box 263 Long Beach, MS 39560-
Southern Louisiana Comm., Inc.	P.O. Box 212 Marksville, LA 71351-
Southern Pay Phone, LLC	P.O. Box 12865 Jackson, MS 39236-
Southern Payphone Co.	P.O. Box 421 Virginia Beach, VA 23458-
Southern PayPhone Services, Inc.	2323 Bainbridge Avenue #108 Kenner, LA 70062-
Southern Payphones Co.	630 Tennis Club Drive Fort Lauderdale, FL 33311-
Southern Tel., Inc.	12515 N. Kendall Drive # 200 Miami, FL 33186-
Southern Telecom Inc.	10427 S.W. 49 Place Cooper City, FL 33328-
Southern Telecom, Inc.	3344 Edenborn Avenue Suite 4 Metairie, LA 70002-
Southern Telecommunications	3506 Maloney Road Knoxville, TN 37920-

Southern Telephone Company	811 S. Main Street London, KY 40741-
Southrep, Inc.	1110 Bay Court Destin, FL 32541-
Southtowns TeleCom	P.O. Box 551 East Aurora, NY 14052-
Southwest Pay Telephone Corp. dba V Technologies II, Inc.	700 Corporate Circle Suite E Golden, CO 80401-
Southwest Telecommunications, Inc.	102 Rio Seco San Antonio, TX 78219-
Speak Easy Telecommunications	2323 Batchelder Street Apt. 1F Brooklyn, NY 11229-
Spear Communications	311 Derby Lane Georgetown, TX 78626-
Speed Communications	245 Sagua La Grande Brownsville, TX 78521-
SST Communications	597 West Montark Highway Lindenhurst, NY 11757-
STAR Features Telecom	P.O. Box 797111 Dallas, TX 75379-
STC Southeastern Telecomm	2461 Kingsley Drive Macon, GA 31204-
STEL	1012 Senoia Road Tyrone, GA 30290-
Stellar Communications	P.O. Box 636 Brownsburg, IN 46112-

Stephen Nowell	P.O. Box 345 Trenton, TN 38382-
Steve Kinnaird DBA SPC Communication	11467 Golden View Lane Knoxville, TN 37923-
Steve Randall dba San Diego Publicomm	P.O. Box 1897 La Mesa, CA 91944-
Steve Sorenson	5250 Michigan Avenue Sanford, FL 32771-
Steven R. Senderling	1163 Beech Court Yardley, PA 19067-
Suburban Payphones	1714 Harwood Royal Oak, MI 48067-
Suburban Phone Inc.	891 New Road Churchville, PA 18966-
Summa Multinational Inc.	79 N Hibiscus Drive Miami Beach, FL 33139-
Summit Telecomm, Inc.	1100 Spring Street Suite 605 Atlanta, GA 30309-
Summit Telecommunications Inc.	P.O. Box 201 Dumont, NJ 07628-
Sun City Vending, Inc.	1220 N.E. 211th Street N. Miami, FL 33179-
Sun Tel North America, Inc.	3483 Palm City School Avenue Palm City, FL 34990-
Sunset Enterprises Inc.	12845 Crab Thicket Lane St. Louis, MO 63131-

Suntel of SC, Inc.	P.O. Box 1911 Lexington, SC 29071-
Super Service S/W Inc.	9331 East Independence Boulevard Matthews, NC 28105-
Supercade Amusements Inc. t/a Automatic Telephone Systems	520 Abbott Drive "E" P.O. Box 209 Broomall, PA 19008-
Superior Communications	11278 W. 70th Avenue Arvada, CO 80004-
Superior Telephone Service Inc.	P.O. Box 2180 Conroe, TX 77305-2180
Supertel Communications	4428 Lamar Highway Timmonsville, SC 29161-
Sussex Phone Exchange	196 Scenic Lakes Road Sussex, NJ 07461-4004
Swan Communications	10437 Walling Drive Tyler, TX 75704-
Swin-Tel, Inc.	10819 US Highway 79 South Henderson, TX 75652-
Sys Telephone Corp.	632 Iroquois Street Oradell, NJ 07649-
T & B Payphone Mgt., Inc.	609 Warren Avenue Flushing, MI 48433-
T&T Communications	2537-C Mapleton Avenue Boulder, CO 80304-
T&T Communications, Inc.	P.O. Box 1504 Center Point, TX 78010-1504

T&T Payphones	4121 Vancouver Court Lexington, KY 40515-
T.D. Communication	P.O. Box 1043 Martinsville, IN 46151-
T.R.F. Communications	246 Mariner Drive Tarpon Springs, FL 34684-
Tangram Communications	P.O. 8024 The Woodlands, TX 77387-8024
Tardio Inc.	2658 Seneca Turnpike Canastota, NY 13032-
Target Management, Inc.	1335A NW St. Lucie Boulevard Suite 307 Port St. Luce, FL 34986-
TEC Pay Com Inc.	268 Pine Valley Road Mocksville, NC 27028-
Teddy Bear Telco	1203 Champion Oaks Roseville, CA 95661-
Tek-Comm Corp.	5308 Derry Avenue Suite L-201 Agoura Hills, CA 91301-
Tekserco Inc.	916 Lake Highlands Allen, TX 75002-
Tel & Tel Payphones Inc.	4943 Harford Avenue Beltsville, MD 20705-
Tel Call Communications	7226 W. Colonial Drive Orlando, FL 32818-
Tel-A-Coin Business Phones Inc.	800 Flicker Road Louisville, KY 40214-

Tel-Pro Enterprises Inc.	12500 S.W. 6th Street Pembroke Pines, FL 33027-
Tel-Pro, Inc.	332 Leffingwell Suite 105 St. Louis, MO 63122-
Tel-Star Communications	232 Savely Drive Hendersonville, TN 37075-
Telad International, Inc.	14250 N.W. Science Park Drive Portland, OR 97229-
Teladot, Inc.	5950 Spring Bow San Antonio, TX 78247-1691
TelBruce Communications	5402 W. McNeil Laveen, AZ 85339-
Telcall Installation & Maintenance	234 Elwood Road East Northport, NY 11731-
Telcom Managerial Co.	B.R. Noble Bank Building Box 558 Lexington, MI 48450-
Telcom Ventures	11144 Sam Snead El Paso, TX 79936-
Telcorp USA	7088 94th Avenue S.E. Mercer Island, WA 98040-
Tele-Com Systems	7676 Hidden Hollow Drive Columbus, OH 43235-
Tele-Connect, Inc.	P.O. Box 887 Chanute, KS 66720-
Tele-Serv, Inc.	300 Franklin Street Grand Haven, MI 49417-

Telebeam Telecommunications Corporation	36-40 37th Street Long Island City, NY 11101-
Telecom Communications Inc.	11403-C East 19th Street Tulsa, OK 74128-
Telecom, Inc.	P.O. Box 2226 Blowing Rock, NC 28605-
Telecox Communications	4087 Mayflower Court Lilburn, GA 30047-
Teledair Communications	816 North Elmer Avenue Sayre, PA 18840-
TeleDuff Inc.	20835 Sky Beaver Court Ashburn, VA 20147-
Telefante Inc.	1492 East 35th Street Brooklyn, NY 11234-
Telefonos Publicos de PR	Priority Transport Building Suite 1 Marginal Los Angeles Carolina, Puerto Rico 00979-
Telemanagement Services, Inc.	P.O. Box 994685 Redding, CA 96099-4685
Telemarks Comm.	1331 James Avenue Port Arthur, TX 77642-1676
Telemax, Inc.	3814 White Rock Road Friendsville, MD 21531-
Telemonde Communications, Inc.	129 Avenue A Marathon, FL 33050-

TeleNational, Inc.	8711 Burnet Road Suite D-40 Austin, TX 78757-
Telephone Operating Systems, Inc.	2496-202 Jett Ferry Road Dunwoody, GA 30338-
Telephone Profits Systems, Inc. (TPS) aka PA_Atlantic	2815 West Ridge Pike Eagleville, PA 19403-
Telephone Technologies Inc.	P.O. Box 475 Jericho, NY 11753-
Telephone Technologies, Inc.	2346 S. Lynhurst Drive D101 Indianapolis, IN 46241-
Telephones Unlimited Inc.	73-54 198th Street Fresh Meadows, NY 11366-
Telephonic Comm	P.O. Box 252 East Rockaway, NY 11518-
Teleplex Coin Comm, Inc.	1123 Broadway New York, NY 10010-
Telesys Corp. dba QuarterMaster Public Comm.	120 West State, Suite 120 P.O. Box 1242 Princeton, IN 47670-
Teletalk, Inc.	136 West Main Street P.O. Box 638 Premont, TX 78375-
TeleTech Communications	P.O. Box 30259 Houston, TX 77249-
Teletrust, Inc.	P.O. Box 2450 Lubbock, TX 79408-
TeleTurner	8502 Pepperidge Grand Blanc, MI 48439-

Televend Inc.	544 Milford Plaza Swansea, MA 02777-
Telfon Communications	6683 Embassy Court Toledo, OH 43537-
Telles Communications	P.O. Box 2622 Ocean City, MD 21842-
Telpro	213 S. O'Brien Street Tampa, FL 33609-
TelSouth Inc. of NC	P.O. Box 655 Lincolnton, NC 28093-
TelStar Communications	800 Thames Drive Hampton, VA 23666-
Tennessee Valley Paytel	P.O. Box 970 Antioch, TN 37011-0970
Terminal Amusement Co.	301 West Clinton Avenue Oaklyn, NJ 08107-
Texas Communications	300 Lark Avenue McAllen, TX 78504-
Texas Public Phones	10915 Overbrook Houston, TX 77042-2709
Textel Communications, Inc.	14 Canyon Creek Village Suite 76 Richardson, TX 75080-
The Bax Group Inc. dba Charity Technologies	16 Greenridge Drive Brookfield, CT 06804-
The Davega Co., Inc. dba Midlands Payphone	P.O. Box 61092 Columbia, SC 29260-

The Fone Connection of Tampa Bay Inc.	2011 Cleveland Street Suite A Tampa, FL 33606-
The Huntington Group dba QuadTel	3382 Glen Devon Lane Berkeley Lake, GA 30096-
The Phone Man Inc.	541 Cumberland Street Westfield, NJ 07090-
The Train-Tel Co.	7038 Central Avenue Suite B St. Petersburg, FL 33707-
Thinc Communications	11312 LBJ Freeway Suite 600 Dallas, TX 75238-
Thompson Telephone	14312 Mackey Street Overland Park, KS 66223-
Three Rivers Phone Corp.	8510 NW 56 Street Miami, FL 33166-
Tiger Vending, Inc.	Throgs Neck Station P.O. Box 44 Bronx, NY 10465-
Tina H. Eaton T/A Ace Communications	714 Berkshire Road Portsmouth, VA 23701-
TLC Games & Payphones	239 Oak Drive DWII Durango, CO 81301-
TMG Inc.	P.O. Box 2187 Lake City, FL 32056-
TMP Enterprises Inc.	10303 123 Avenue N. Largo, FL 33773-
Tom Murphy Sales	26626 Southwestern Redford, MI 48239-

Tomco Vending	2250 S. Vrain Street Denver, CO 80219-
Tony Peckler	7510 Hollywood Boulevard # 207 Los Angeles, CA 90046-
Torrance Enterprises	9120 Waterfowl Flyway Chesterfield, VA 23838-
TOS Enterprises Inc.	P.O. Box 8134 Coral Springs, FL 33075-
Total Payphone Systems Inc.	P.O. Box 763981 Dallas, TX 75376-
Total Telecommunications Services Inc. aka TTSI Inc.	6669 Peachtree Industrial Boulevard Norcross, GA 30392-
Touch Tone Communications	P.O. Box 12913 Wichita, KS 67277-
TR Communications	50 A South Main Street Spring Valley, NY 10977-
TR Systems	1 Northern Boulevard Great Neck, NY 11021-
Trace Consulting	1112 Weston Road PMB 106 Weston, FL 33326-
Tramfloc, Inc.	P.O. Box 350 Tempe, AZ 85280-
TransDominion, Ltd.	205 Farmview Road Stanardsville, VA 22973-
Treasure Coast Payphone	6581 SE Baltusrol Terrace Stuart, FL 34997-

Tri Tel, Inc.	7159 Rock Creek Road Waco, TX 76708-
Tri-Cell Communications, Inc.	5090 Howard Road Cumming, GA 30040-
Tri-County Inc.	1011 E. Erie Avenue Philadelphia, PA 19124-
Tri-Tel Communications, Inc.	3234 Flatrock Drive Whitehall, PA 18052-
Tri-World Enterprises	3042 Winding Lane Westlake Village, CA 91361-
Triad Communications	5714 Folsom Boulevard #106 Sacramento, CA 95819-
Triad Telecom	599 Brookforest Drive Winston-Salem, NC 27107-
Triangle Telephone Company, Inc.	P.O. Box 5730 Cary, NC 27512-
Trinity Communications	P.O. Box 81337 Conyers, GA 30013-
Trinity Holdings Ltd., Inc.	17369 Shirley Avenue Port Charlotte, FL 33948-
Trinity Phone Systems LLC	Route 1 Box 262 Bruceton Mills, WV 26525-
Tru-Save Bureau, LLC	9600 Preston Vineyard Road Frisco, TX 75035-
Tru-Tel communications	7762 E. Gray Road #600 Scottsdale, AZ 85260-
Trusty Pay Phones Inc.	1609 Kenmore Avenue Kenmore, NY 14217-

Tsung-Lung Lee dba PolynAsia Enterprises	15353 Weddington Street #D318 Van Nuys, CA 91411
Turkey Creek Services	P.O. Box 93 Almond, NC 28702-
TW Equipment Co.	1560 Harrell Lane Clarksville, TN 37043-
U.S. Air & Phone	4609 Blakeford Court Flowery Branch, GA 30542-
U.S. Coinphone	2331 Stoneclick Court Hilliard, OH 43026-
U.S. Public Payphone of Maryland	P.O. Box 21495 Baltimore, MD 21282-
U.S. Public Telephone Inc.	20416 N.E. 16th Place North Miami Beach, FL 33179-
U.S. Telco., Inc.	104-21 68th Drive Forest Hills, NY 11375-
U.S. Telelink, Inc.	P.O. Box 271478 Corpus Christi, TX 78427-
Ultra Telecom, Inc.	5841 Sentinal Walk Norcross, GA 30093-
UNICOMM	6409 146th Avenue N.E. Redmond, WA 98052-
Unique Communications, Inc.	1361 W. Euless Boulevard Euless, TX 76040-
United Long Distance Inc.	Route 1 Box 471 B Kingsville, TX 78363-

United Payphone Network	2350 W 7th Street St. Paul, MN 55116-
United Payphone Systems	100 Thurpe Street Fairfield, CT 06430-
United TelCom Services, Inc.	1145 Gaskins Road Suite 106 Richmond, VA 23233-
United Telecom	853 Ocean Avenue Beachwood, NJ 08722-
United Telecom, Inc.	P.O. Box 226 Harleysville, PA 19438-0226
United Teleconnect, Inc.	11 Grandview Avenue Brookhaven, PA 19015-
Universal Telecom	3117 W Olive Avenue Burbank, CA 91505-
Universal Telecom.	10105 E. Via Linda Suite 103-244 Scottsdale, AZ 85258-
Universal Telephone, Inc.	1519 Huguenot Road Suite 102 Midlothian, VA 23113-
Unlimited Telecommunications Inc	1525 67 Street Brooklyn, NY 11219-
Urban Telecom	330 Coster Street Bronx, NY 10474-
US Paytel Delta LLC	P.O. Box 12865 Jackson, MS 39236-
US Public Phones, Inc.	135E Gaither Drive Mt. Laurel, NJ 08054-

US TeleServices, Inc.	10410 Main Street # 210 Fairfax, VA 22030-
USA Comlink Corp.	15110 Bellaire Boulevard #275 Houston, TX 77083-
USAPayphone Company	401 Sage Lane Euless, TX 76039-
USA Phones Southwest	1104 Cenotaph Way Colorado Springs, CO 80904-
USATEL, Inc.	P.O. Box 540106 Houston, TX 77006-
V&E Communications, Inc.	2614 W. Craig Place San Antonio, TX 78228-
Vail Communications, Inc.	1511 Walnut Avenue Oreland, PA 19075-
Valley Pay Phones	P.O. Box 911 Aumsville, OR 97325-
Vend-One Communications, LLC	6723 E. 50th Avenue Commerce City, CO 80022-
VendComm Corp.	12410 S.W. 96th Street Miami, FL 33186-
Venture Communications	104 Berkeley Square Lane Suite 8 Goose Creek, SC 29445-
Versetel Communications Inc.	P.O. Box 2560 Conway, NH 03818-
Verstrate Communications	11191 Westheimer #147 Houston, TX 77042-

VHS Communications Inc.	1449 Granada Place Far Rockaway, NY 11691-
Victel Communications, Inc.	P.O. Box 617377 Orlando, FL 32861-
Video Phone Communications	P.O. Box 19652 San Juan, Puerto Rico 00910-1652
Vincent Napoli dba Apple Phone Vending	346 Gifford Hallow Road Berne, NY 12023-
VIP Phone Co.	4006 Rocky Spring Road Chambersburg, PA 17201-8784
Virginia Communications, Inc.	971 Red Oak Circle Newport News, VA 23608-
Vision Telcom	2058 N. Mills Avenue #102 Claremont, CA 91711-
VisionComm, Inc.	124 Pointwest Blvd St. Charles, MO 63301-
Visions Vending Payphone Service	8232 NorthPointe Boulevard Pensacola, FL 32514-
Voiceline Com.	3646 E. Harmon Avenue Las Vegas, NV 89121-
Von Haugg Associates	4878 Tabor Road Berne, NY 12023-
Voyager Communications	127 Wallinwood N.E. Grand Rapids, MI 49503-
W & D Enterprises, Inc.	1375 Windy Ridge Court Longwood, FL 32750-

W/H Communications aka Wathen/Hupp Communication	3900 Saturn Road Hilliard, OH 43026-
Walter Sylvest dba Waltcom Communications	114 Magee Road Franklinton, LA 70438-
Washington Payphones	10824 Glenwood Drive S.W. Tacoma, WA 98498-
Watauga Telephone Co.	P.O. Box 5084 Banner Elk, NC 28604-
Wave Communications	102 C West Germantown Pike Norristown, PA 19401-
Wellington Technologies, Inc.	P.O. Box 6552 Fair Haven, NJ 07704-
West Coast Payphone Company	P.O. Box 1347 Thousand Oaks, CA 91358-0347
West Michigan Pay Phones	P.O. Box 168 Boyne City, MI 49712-
West Michigan Pay-Tel Inc.	324 Washington Suite 105 Grand Haven, MI 49417-
West-Penn Telecom	1001 McAllister Drive New Kensington, PA 15068-
Westel Communications	1814 Port Seabourne Way Newport Beach, CA 92660-
Western Pacific Telephone Co	12329 149th Street E. Puyallup, WA 98374-
Western Paytel, Inc.	4601 Wadsworth Boulevard Wheat Ridge, CO 80033-3305

Western States Telecom	1003 38th Street Rio Rancho, NM 87124-
Westmark, Inc.	285 Main Avenue Stirling, NJ 07980-
Wheatel Communications, Inc.	P.O. Box 24252 Louisville, KY 40224-0252
Wheeling Communications	71 Wheeling Avenue Staten Island, NY 10309-
Whitcom Payphones	2433 Bullock Trail Virginia Beach, VA 23454-
Wilderness Communications	P.O. Box 9429 Jackson, WY 83002-
Wiley Wells	P.O. Box 561749 Charlotte, NC 28256-
Willcall Payphone Services	165 Redrock Road Sedona, AZ 86351-
William E. Pope Jr.	334 Ivy Yokeley Road Winston-Salem, NC 27107-
William F. Spaulding dba Intelli-Phone	5508 Park Boulevard Wildwood Crest, NJ 08260-
William Fridley dba Missouri Telcom	P.O. Box 3070 Lake St Louis, MO 63367-
Wisconsin Area Payphone	N 9454 Ridge Road Van Dyne, WI 54979-
Wisconsin Payphone Services	N 3717 Oestreich Lane Fort Atkinson, WI 53538-
Wood Two Payphones	761 Darryl Drive Denison, TX 75021-

World Communications Network LLC	211 Randall Street Greer, SC 29651-
WPI Telecommunications	P.O. Box MWH Wichita Falls, TX 76307-
WSR Communications	3333 Central Avenue Suite F Riverside, CA 92506-
Wynn Communications, Inc.	7522 F.M. 1960 W. Suite 231 Houston, TX 77070-
X-Change Communication	21538 Hiawatha Trail South Field, MI 48075-
Xpress Payphone Services	1656 Stonewood Court San Pedro, CA 90732-
Y-Makk Enterprises	15940 W. Troon Circle Miami, FL 33014-
Yates Communications	11857 SW 160th Rose Hill, KS 67133-
Z Payphone Corporation	6366 Fenton Street Arvada, CO 80003-
Z Venture Capital Frontiers, Inc.	3870 Crenshaw Boulevard #329 Los Angeles, CA 90008-
Zenith Information Systems, Inc.	P.O. Box 7574 East Rutherford, NJ 07073-

EXHIBIT B

DataNet Systems PSP Customers

PSP	Address
AAA Coin-Phones and Systems	P.O. Box 1108 Peoria, IL 61653-1108
ADCOM TeleServices	4118 W. Lawrence 104 Chicago, IL 60630-
Aerocomm	9853 Finnegan Brighton, MI 48116-
American Coin Telephone, Inc.	3013 S. Wolf Road #252 Westchester, IL 60154-
American Pay Telephone Corporation	2800 N. Lake Shore Drive #3306 Chicago, IL 60657-
American Telephone, Inc.	P.O. Box 6571 Libertyville, IL 60048-
Amphone Enterprises, Ltd./Premier Payphones	7507 Hickory Nut Grove Road Cary, IL 60013-1781
ANJ Communications	512 Fontaine Bleau O'Fallon, IL 62269-
Aurora Telecom Division	P.O. Box 1027 Aurora, IL 60507-1027
Automated Coin-Phones & Telecommunications	583 N. Wolf Road Wheeling, IL 60090-
Barwood Group	124 S. Lancaster Mt. Prospect, IL 60056-
BMI Inc.	P.O. Box 342 Itasca, IL 60143-0342

Capitol Telephone	2415 N. Cicero Chicago, IL 60639-
Carl Chapman dba Chapman Services	310 Greenfield Road Shorewood, IL 60431-9674
Central Tele-Leasing, Inc.	#1 Burwell Drive P.O. Box 430 Lincoln, IL 62656-
Chicago Coin Communications, Incorporated	8 Yorkshire Drive Oak Brook, IL 60523-
Chicago Payphones, Inc.	1138 W. Wilson Avenue Chicago, IL 60640-
Chicago Public Telephone	2923 S. Canal Street Chicago, IL 60616-
Coin Activated Telephone	1153 S. Lee Street Suite 226 Des Plaines, IL 60616-
Communication Connection	996 E. Steger Road Crete, IL 60417-
Comtel Service Company	633 Edward Road Naperville, IL 60540-
Conles, Inc.	P.O. Box 936 McHenry, IL 60051-0938
Continental Payphone Services, Inc.	P.O. Box 1244 Matteson, IL 60443-
Cox Communications, Ltd.	350 Dundee Avenue Elgin, IL 60120-3836
Crystal Communications, LLC	P.O. Box 249 Orland Park, IL 60462-

D.C.T. Communications	5525 W 110th Street #4 Oak Lawn, IL 60453-
Dial-Com Systems, Inc.	3215 West 127th Street Blue Island, IL 60406-
Diversified Telecommunications, Inc.	1130 S. Wabash Suite 501 Chicago, IL 60605-
DMD Communications, Inc.	28000 S. Klemme Road Beecher, IL 60401-
Express Telephone Systems, Inc.	1345 Wiley Road Suite 111 Schaumburg, IL 60194-
Fox Valley Public Fax-Fone, Inc.	P. O. Box 1478 Elgin, IL 60121-
Galaxy Payphones Systems	8135 Cherokee Trail Tinley Park, IL 60477-
Gemini Electronics, Inc.	1715 S. Grace Park Ridge, IL 60068-
Gerlach Enterprises, Inc.	2220 Main Avenue East West Fargo, ND 58078-0189
Global Communications	1651 Beach Road Waukegen, IL 60087-
Herschel's Coin Communications	3409 Meadow Avenue East Peoria, IL 61611-
ICC Communications, Inc.	126 East Wing Street Suite 242 Arlington Heights, IL 60004-
Illinois Payphone Systems, Inc.	10061 South 76th Avenue Bridgeview, IL 60455-

Illinois Public Telephone, Inc.	307 Franklin River Forest, IL 60305-
Infinitel, Incorporated	240 S. Pineapple Avenue Suite 855 Sarasota, FL 34246-
Innovative Businesses And Services, Inc.	1907 Towner Suite 2A Glendale Heights, IL 60139-
Intelcom, Inc.	720 W. Bryn Mawr Avenue Roselle, IL 60172-0001
J & J Telecommunications	1440 Old Skokle Road Highland Park, IL 60035-
J.B. Tel	7301 E. Prairie Lincolnwood, IL 60645-
Jarrett Communications	37W680 Knollcreek Drive Chicago, IL 60175-
JKC Coin Communications	1724 N. 18th Avenue Melrose Park, IL 60160-
JM Quick Payphones & Service	7043 W. 63rd Street Chicago, IL 60638-
Joe Abraham & Sons Amusement, Inc.	1212 S. Western Avenue Peoria, IL 61605-
Joltran Communications, Inc.	5541 Oakville Center Suite 117 St. Louis, MO 63129-
Kencom, Inc.	1014 Victoria Berkeley, IL 60163-
Liberty Data	4535 Eleanor Drive Long Drive, IL 60047-

Lincoln Telecom	3N660 Indian Mount Road St. Charles, IL 60174-
Lyntel Inc.	P.O. Box 91 Riverside, IL 60546-
M & M Tele Services, Inc.	333 Greenview Drive Crystal Lake, IL 60014-
Make-A-Call, Inc.	P.O. Box 4505-250 Oak Park, IL 60303-4505
Metro Payphone Services, Inc.	1843 W. North Avenue Chicago, IL 60622-1311
MetroCom L.L.C.	P.O. Box 59 Wadron, IL 60557-
Metrotel Communications	1111 Hawkweed Lane Lake Forest, IL 60045-1101
Mexicana Communications	3731 W. Addison Street Chicago, IL 60618-
Midwest Communication Solutions, Inc.	P.O. Box 6921 St. Louis, MO 63123-9998
Midwest Telecommunications, Inc.	897 E. Schaumburg Road Schaumburg, IL 60173-
Missouri Telephone & Telegraph, Inc. (MT&T)	25 Meadow Ridge Drive St. Peters, MO 63376-
Modern Tele Co.	885 Huckleberry Lane Northbrook, IL 60062-
N.A. Communications, Inc.	2528 N California Avenue Chicago, IL 60647-
National Tel & Telex	4111 Terri-Lyn Lane Northbrook, IL 60062-

Northwestern Communications, Inc.	1901 S. Wright Boulevard Schaumburg, IL 60193-
Nu-Way Communications, Inc.	4605 W. 100th Place Oak Lawn, IL 60453-
Omni Communications, Inc. d/b/a Omni Comm Marketing	3 Danada Square Unit 222 Wheaton, IL 60187-
Omni Payphone Services, Ltd	2198 Ogden Avenue Suite 185 Aurora, IL 60504-
Pace Telecommunications, Inc.	3333 East 143rd Street Burnham, IL 60633-
Payphone Marketing Systems	34039 N. Lakeside Drive Grayslake, IL 60030-
Payphone Services, Inc.	3540 N. Southport Chicago, IL 60657-
Phonco Communications, inc.	P.O. Box 1141 Orland Park, IL 60462-
Phone Mex	4909 S. Long Avenue Chicago, IL 60638-
Principal Properties	2300 Forest Avenue Rolling Meadows, IL 60008-
Progressive Controls, Incorporated	P.O. Box 2315 Loves Park, IL 61131-
PSM Pay-Tel of America	728 N. Prospect Street Rockford, IL 61107-
Quick Call, Inc.	P.O. Box 487 Lemont, IL 60439-

R & M Communications	12454 W.Van Court Zion, IL 60099-
R.E.H. Enterprises, Inc.	121 E. Grand Avenue Northlake, IL 60164-
RCD Property Management, Inc.	2400 E. Main Street St. Charles, IL 60104-
Royal Public Payphones, Inc.	P.O. Box 138456 Chicago, IL 60613-
Ruminski, Richard	535 Parkview Terrace West Algonquin, IL 60102-
SCS Telecom, Inc.	4849 N. Scott Street Suite 20 Schiller Park, IL 60176-
Service Central	3321 Holeman Avenue Steger, IL 60475-
Sheffield Systems, Inc.	5601 W. 120th Street Alsip, IL 60658-3449
Siebert Enterprises, Inc.	7814 Adams Darien, IL 60561-5002
Sistel Communications	4124 N. Western Chicago, IL 60618-
South Suburban Payphone	4921 West 173rd Street County Club Hills, IL 60478-
Superior Coin Systems Inc.	465 Windy Point Drive Glendale Hghts, IL 60139-
Telenet Communications	8725 Carriage Lane Tinley Park, IL 60477-

TNT Vending/ Quality Telephone	1627 74th Court Elmwood Park, IL 60707-
Trinity Telecommunications	1624 W. Grace Chicago, IL 60613-2767
Tronix Communication	10 South O59 Schoger Road Unit 30 Naperville, IL 60564-
Visioncomm, Incorporated	124 Point West Blvd St. Charles, MO 63301-
West Suburban Currency Exchange	1400 E. Touhy Avenue Suite 100 Des Plaines, IL 60018-

---

EXHIBIT C

Davel Communications Group, Inc. PSP Customers

PSP	Address
Communications Central, Inc.	10120 Windhorst Road Tampa, FL 33819-
Telaleasing Enterprises, Inc.	10120 Windhorst Road Tampa FL 33819-

---

EXHIBIT D

NSC TELEMANAGEMENT CORPORATION PSP CUSTOMERS

PSP	Address
Cointel	P.O. N Daly City, CA 94017
Larry Hall	868 Bonnie Glenn Drive Marietta GA 30067
O'Neill Enterprises, Inc.	349 Ave E. Bayonne, NJ 07002
Polk County Storage/ All In One	590 Hoffman Rd Independence, OR 97351
NSC Communications Public Services Corporation	6920 Koll Center Parkway, Suite 211 Pleasanton, CA 94566
Advanced Payphone Systems, Inc.	6920 Koll Center Parkway, Suite 211 Pleasanton, CA 94566
GFA Communications, Inc. d/b/a Communications Management Company 200 and/or Communications Management Company 150	6920 Koll Center Parkway, Suite 211 Pleasanton, CA 94566
International Office Machines Co. d/b/a Hare Communications, Inc.	6920 Koll Center Parkway, Suite 211 Pleasanton, CA 94566
Payphone Services, Inc. d/b/a Communications Management Company 300	6920 Koll Center Parkway, Suite 211 Pleasanton, CA 94566

Paytel Northwest, Inc.	6920 Koll Center Parkway, Suite 211 Pleasanton, CA 94566
Southern California Pay Phone Corporation	6920 Koll Center Parkway, Suite 211 Pleasanton, CA 94566
SNC, Inc. (formerly Star Network Corporation)	6920 Koll Center Parkway, Suite 211 Pleasanton, CA 94566
Starnet Hawaii, Inc.	6920 Koll Center Parkway, Suite 211 Pleasanton, CA 94566

EXHIBIT E

Jaroth, Inc. d/b/a Pacific Telemanagement Services PSP Customers

PSP	Address
Golden Tel	3675 West Harmon Avenue #1 Las Vegas, NV 89103-
Pacific Coin	16200 Stagg Street Van Nuys, CA 91406-
Pelican Communications, Inc.	P.O. Box 945 Diablo, CA 94528-

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	**CASE NO.:**
	)	**1:99 CV 696 (ESH)**
Plaintiffs,	)	
	)	
v.	)	
	)	
AT&T CORPORATION,	)	
	)	
Defendant.	)	

AT&T'S MOTION TO DISMISS ASSIGNEE PLAINTIFFS' CLAIMS

(Filed Jan. 8, 2003)

Defendant AT&T Corporation moves pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the claims of APCC Services, Inc. ("APCC"), Data Net Systems, LLC, Jaroth, Inc., NSC Telemanagement Corporation, and Davel Communications Group, Inc. In support of its motion, Defendant states:

1. These plaintiffs sue only as "assignee[s] and attorney[s]-in-fact" for the independent payphone service providers listed in Exhibits A-E to the First Amended Complaint.

2. The deadline for discovery responses by these Plaintiffs has now passed. The responses demonstrate that these Plaintiffs have suffered no injury-in-fact of their own and have no personal stake in the outcome of the litigation. These Plaintiffs, therefore,

have no standing to sue on behalf of the payphone service providers.

3. The assignments to Plaintiff APCC Services, Inc. are not valid under the applicable state law. Even if this Plaintiff has standing, therefore, its claims must still be dismissed.

For the foregoing reasons, as set forth more fully in the attached Memorandum, AT&T respectfully moves the Court to dismiss all claims by these Plaintiffs for lack of standing. Should the Court hold that the Plaintiffs have standing, AT&T moves for dismissal of the claims by APCC Services, Inc.

Respectfully submitted,

/s/ Clifford J. Zatz

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D.C. Bar No. 431218
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(908) 532-1217 (fax)
ATTORNEYS FOR AT&T CORPORATION

Dated: January 8, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	**CASE NO.:**
	)	**1:99 CV 696 (ESH)**
Plaintiffs,	)	
	)	
v.	)	
AT&T CORPORATION,	)	
	)	
Defendant.	)	

AT&T'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS ASSIGNEE PLAINTIFFS' CLAIMS

Defendant AT&T Corporation moves, pursuant to Fed. R. Civ. P. 12(b)(1), to dismiss the claims of Plaintiffs APCC Services, Inc. ("APCCS"), Data Net Systems, LLC, Jaroth, Inc., NSC Telemanagement Corporation, and Davel Communications Group, Inc. "as assignee[s] . . . and attorney[s]-in-fact" for the independent payphone service providers ("PSPs") listed in Exhibits A-E to the First Amended Complaint. Plaintiffs lack standing to bring these claims and the Court lacks subject matter jurisdiction to hear them under Article III, Section 2 of the United States Constitution. Even if Plaintiffs have standing,

the claims by APCCS should be dismissed for lack of a valid assignment under state law.[1]

STATEMENT OF FACTS

This lawsuit arises under § 206 of the Telecommunications Act of 1996, which requires Interexchange Carriers ("IXCs") such as AT&T to pay "dial-around" compensation to payphone service providers ("PSPs") for certain long distance calls originating from their payphones. The named plaintiffs filed this lawsuit "on behalf of hundreds of entities that own and operate over 400,000 public payphones." First Am. Compl. at ¶ 1. Plaintiffs identify themselves as "billing and collection agent[s], assignee[s] of the claims and attorney[s]-in-fact" for approximately 1300 PSPs. *Id.* at ¶¶ 2-6.

The Complaint alleges that Federal Communications Commission regulations promulgated pursuant to § 206 direct IXCs to make payment *to the independent PSPs, id.* at ¶ 23; that AT&T failed to make appropriate dial-around compensation payments *to the independent PSPs, id.* at ¶ 38; and that it is the *independent PSPs* who have been damaged, *id.* at ¶ 40. Under Section 206 of the Telecommunications Act of 1996, AT&T's potential liability for payphone compensation is to "the person or persons injured" – here, the PSPs. *Id.* at ¶ 42.

---

[1] Plaintiff Peoples Telephone Company brings this action on its own behalf, and this motion is not directed to its claims.

Nevertheless, the PSPs are not named as plaintiffs, but merely listed in exhibits to the Complaint. Plaintiffs sue as "assignee[s] of the claims" of the PSPs under an Assignment and Power of Attorney (the "Assignment"). The Assignment provides that each PSP

> hereby assigns, transfers and sets over to the [Plaintiff] *for purposes of collection* all rights, title and interest of the Company in the Company's claims, demands or causes of action for 'Dial-Around Compensation' ('DAC'). . . .

Ex. A at 1 (emphasis added).[2] Each assignment also appoints one of the Plaintiffs as attorney-in-fact with the power to do all acts necessary to collect dial-around compensation, including the power to retain counsel, file lawsuits, and enter into settlements. The Assignment transfers to the Plaintiff only the PSP's right to sue; it does not assign Plaintiff the right to retain or share in any proceeds of the litigation.

In an agreement entitled "Amendment to APCC Services Agency Compensation Agreement," *Ex. B,* to which the Assignment to Plaintiff APCCS is attached, the PSP agrees that APCCS will apportion any settlement money among the PSPs. *Id.* at ¶ 7. In the cover letter to the PSPs forwarding these agreements, APCCS informs each PSP that:

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[2] In discovery, Plaintiffs have produced nearly 1300 assignments from the PSPs listed in the exhibits to the Complaint. All of the assignments are identical to Exhibit A.

(a) recoveries will be turned over to the PSPs, *Ex. C* at 2;

(b) the legal team has already been assembled (*i.e.*, before any PSP had decided to bring a claim), *id.*;

(c) the Assignment and Power of Attorney "assigns your DAC claims . . . to APCCS 'for purposes of collection.' This will allow APCCS to prosecute the litigation on your behalf. *If at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose,*" *id.* at 3 (emphasis added); and

(d) if the PSP stops contributing to the legal fees, Plaintiffs will drop it from the lawsuit and the PSP will again have the right to sue in its own name, *id.* at 3.

Thus, the 1300 individual PSPs did not assign to Plaintiffs all rights, title, and interest in the payphone compensation sought in this action. At most, they attempted to confer upon Plaintiffs only the right to sue on their behalf, a right that is expressly conditional. The PSPs retained the rights to any recovery and the right to withdraw the assignment of their claims at any time. The Assignments give Plaintiffs no stake of their own in the outcome of the litigation.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO BRING THIS LAWSUIT AS ASSIGNEES OF THE INDIVIDUAL PSPs' CLAIMS

A. The Burden Is On Plaintiffs to Prove That They Have Standing

Article III, Section 2 of the United States Constitution limits this Court's subject matter jurisdiction to resolution of actual cases or controversies. Unless an actual case or controversy exists between the named plaintiff and the defendant, the plaintiff lacks standing to assert the claim and the Court lacks jurisdiction to entertain it. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). This is a "bedrock requirement," and "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd,* 521 U.S. 811, 818 (1997) (citations omitted).

The "irreducible constitutional minimum" of standing requires that Plaintiffs establish that they suffered an actual injury-in-fact, *i.e.*, an invasion of a legally protected interest that is "concrete and particularized." This is not a mere pleading requirement; it is an *indispensable part of Plaintiffs' case. Lujan,* 504 U.S. at 560-61 (citations omitted). The burden is on Plaintiffs to allege and prove that they have standing. *See id.* at 571, n.4. Each element of standing "must be supported in the same way as any other

matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561.

On a motion challenging subject matter jurisdiction, this Court may resolve disputed jurisdictional fact issues by reference to evidence outside of the pleadings without converting the motion into one for summary judgment. *Walker v. U.S. Dept. of the Army,* 60 F. Supp. 2d 553, 555 (E.D. Va. 1999). No presumptive truthfulness attaches to Plaintiffs' jurisdictional allegations; the existence of disputed material facts does not preclude the Court from evaluating for itself the merits of the jurisdictional claims. *Id.* (*citation omitted*); *Hilton Hotels Corp. v. Damornay Antiques, Inc.,* 1999 WL 959371 (S.D.N.Y. 1999); *Holt v. United States,* 46 F.3d 1000, 1002-1003 (10th Cir. 1995).

B. Plaintiffs Lack Standing Because They Have Suffered No Injury In Fact

The named Plaintiffs lack standing to sue as assignees of the PSPs' claims because they have suffered no injury of their own. They concede in their Complaint that the payphone compensation obligation runs from AT&T to the individual PSPs, not from AT&T to Plaintiffs. The Assignments give Plaintiffs no stake in the outcome of the litigation. Under these circumstances, Plaintiffs present this Court with no "case or controversy" within the meaning of Article III.

The injury-in-fact necessary for standing requires that the party seeking review *itself* be injured by the conduct at issue. *Lujan,* 504 U.S. at 563. "Article III judicial power exists only to redress or otherwise to protect against injury *to the complaining party.*" *Vermont Agency of Natural Resources v. United States,* 529 U.S. 765, 771 (2000) (citations omitted). Further, the plaintiff must demonstrate that it has a concrete private interest in the outcome of the litigation, *Lujan,* 504 U.S. at 573, *that is related to the injury-in-fact, Vermont Agency,* 529 U.S. at 772. The interest must be in obtaining compensation for, or preventing the violation of, the plaintiff's legally protected rights. Thus, a plaintiff may litigate only those disputes in which it has a personal stake. *Raines v. Byrd,* 521 U.S. 811, 819 (1997). A plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). "[T]he question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen,* 392 U.S. 83, 99-100 (1968).

Courts have found that a plaintiff has a substantial stake in the outcome of a case where it will share in the recovery, will incur legal fees and expenses, and may be liable for costs. *See, e.g., United States v. United Technologies Corp.,* 985 F.2d 1148, 1154 (2d Cir. 1993). An interest in the litigation that is merely a "by-product" of the lawsuit, however, does not give

rise to a cognizable injury-in-fact for Article III purposes. *Vermont Agency,* 529 U.S. at 772. Thus, potential recovery of the costs of bringing suit or of attorneys' fees alone does not confer standing on a party. *Id.*

The claims for payphone compensation made by Plaintiffs as assignees belong to the non-party PSPs and not to Plaintiffs themselves. The First Amended Complaint concedes that Plaintiffs rely entirely on the Assignments to give them standing to sue. The Assignments, however, merely purport to transfer the PSPs' claims "for purposes of collection." *Ex. C* at 3. The PSPs did not assign to Plaintiffs any rights to any funds they may recover on the PSPs' behalf; Plaintiffs acquired only the right to pursue and manage litigation.

In a similar situation, the Second Circuit recently held that a mere assignee of the right to sue has no injury sufficient to confer standing upon it under Article III. *See Connecticut v. Physicians Health Servs. of Conn., Inc.,* 287 F.3d 110, 115 (2d Cir. 2002). In *Physicians Health,* eight individual health plan participants assigned to the State of Connecticut their claims for ERISA violations against an insurance company. *Id.* at 112. The plan participants: (a) empowered the state to bring an action to enjoin any act or practice or to obtain other equitable relief; (b) agreed to cooperate in any such action; and (c) agreed that the positive results of any litigation would inure to the benefit of the plan participants. *Id.* at 114. The complaint alleged that the case was brought for the

benefit of the plan participants, the plan participants were the injured parties, and the relief requested was for the benefit of the plan participants. *See id.* at 118-119, n.12.

As here, in short, the lawsuit was brought by a nominal plaintiff on behalf of the parties that had suffered the alleged injury and would be entitled to any proceeds. *Cf.* First Am. Compl. at ¶¶ 18-23 (statute requires IXC to pay per call compensation *to the PSP*); *id.* at ¶¶ 40, 49 (*independent payphone service providers* have been damaged); *id.* at ¶¶ 42(b), 51(b) (requesting an accounting *for the benefit of the PSPs*). After considering these facts in light of Supreme Court precedent, the Second Circuit concluded:

> As assignee in the present case, however, the State fails to meet the injury requirement because it does not have a 'concrete private interest in the outcome of the suit.' In other words, it has failed to allege that it suffered an 'injury in fact' that is 'particularized.' The actions of the defendant, as alleged, do not 'affect the plaintiff in a personal and individual way.' Through the assignments, the State has acquired only the right to control the equitable portion of a lawsuit seeking redress of the assignor-participants' rights under ERISA. None of the remedies being sought would flow to the State as assignee. As the State puts it 'this case is brought *solely for the benefit of the assignors* and those similarly situated.' Even if the assignments are valid as a contractual matter, they thus

> merely give the State the right to act as a nominal party. The State as an assignee therefore lacks standing under Article III of the Constitution.

287 F.3d at 118-119 (emphasis in original, citations omitted).

This arrangement stands in stark contrast to situations where courts have found that an assignment might be sufficient to confer constitutional standing. For example, where a health care provider spends money on behalf of a patient and in return receives an assignment of the patient's rights to reimbursement under a health plan, the health care provider has standing as an assignee to sue under ERISA. *See, e.g., I.V. Services of Am. v. Trs. of Am. Consulting Eng'rs Council Ins. Trust Fund,* 136 F.3d 114, 117 n.2 (2d Cir. 1998). The health care provider has suffered injury in fact because it had a duty to pay for, and has actually paid for, the patient's medical care. The assignment allows it to stand in the insured's shoes with respect to injury and remedy and to obtain reimbursement of its own payment to the insured. Here, Plaintiffs have not paid the compensation allegedly owed to the PSPs, are not seeking reimbursement of their own funds, will not be entitled to any recovery of their own, and therefore cannot claim any stake in the outcome.[3]

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[3] Constitutional standing should not be confused with real party in interest status under Fed. R. Civ. P. 17(a). Subject

(Continued on following page)

C. Plaintiffs' Lack of Standing Is Demonstrated By Their Inability to Effectuate Any Definitive Resolution of This Litigation

That the Plaintiffs lack the requisite interest in this litigation to confer standing is evident from their inability to assure any final and definitive resolution of this litigation. As a practical matter, the use of "straw" plaintiffs undermines any possibility of finality in at least the following ways:

- Any PSP may withdraw its assignment to Plaintiffs at any time and bring a lawsuit against AT&T in its own name. *Ex. C* at 3. Thus, if any PSP is not satisfied with any interlocutory decisions of this Court or its representation by its assignee, it may drop out and sue AT&T elsewhere.

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matter jurisdiction must exist before any Rule 17 analysis applies. *In re Certain Complaints Under Investigation,* 783 F.2d 1488, 1497 (11th Cir. 1986). In other words, Rule 17 does not provide independent jurisdictional grounds. *Airline Reporting Corp. v. Sand N Travel, Inc.,* 58 F.3d 857, 862 n.4 (2d Cir. 1995); *Navarro Savings Ass'n. v. Lee,* 446 U.S. 458, 462 n.9 (1980) (Rule 17 and jurisdictional rules serve different purposes and need not produce an identical outcome in all cases). Thus, although AT&T does not concede that the assignments make Plaintiffs the real parties in interest under Rule 17, such status is irrelevant to the issue of whether the named Plaintiffs have standing. *See Physicians Health,* 287 F.3d at 118-119 (assignments gave the plaintiff the contractual right to sue but it nevertheless lacked Article III standing). *See also* Fed. R. Civ. P. 82 (the Rules may not be "construed to extend or limit the jurisdiction of the United States district courts. . . .")

- As Plaintiffs concede in correspondence related to document production by the PSPs, the list of PSPs they represent varies from payment quarter to payment quarter as PSPs are bought and sold or go out of business. *Ex. E, Letter to Clifford J. Zatz from Henry T. Kelly, December 16, 2002.* Without naming the PSPs as plaintiffs, it is never entirely clear at any given moment whose claims are being pursued in this litigation.

- Should the case be decided in AT&T's favor, individual PSPs might later argue that principles of res judicata and collateral estoppel do not apply on the ground that the PSPs were not parties to the litigation.

- If the case settles, it is unclear whether Plaintiffs would be the proper payees on any settlement check or could produce valid releases from the PSPs.

- By virtue of the assignments, the parties from whom AT&T seeks to collect on its counterclaims are not before the Court. AT&T's counterclaims are compulsory under Fed. R. Civ. P. 13 as they arise out of the same transaction as the main claim. Yet the named Plaintiffs have not been assigned liability on these counterclaims; they arguably have no liability of their own on the counterclaims; and there is no indication that they have any fund from which to pay for any recovery by AT&T.

These issues do not arise when the named plaintiff has a real and personal stake in the outcome of the litigation and sues to redress its own injury.

II. EVEN IF PLAINTIFF APCCS HAS STANDING, ITS CLAIMS SHOULD BE DISMISSED BECAUSE ITS ASSIGNMENTS ARE NOT VALID UNDER VIRGINIA LAW

Even if this Court finds that the Assignments confer standing upon the named Plaintiffs, the claims made by Plaintiff APCCS on behalf of its assignors – the large majority of the PSPs represented here – must still be dismissed. Wholly apart from the standing analysis, the assignments to APCCS are not valid.

The form assignment under which APCCS sues is an amendment to APCC Services Agency Compensation Agreement, which contains a Virginia choice of law clause. *Ex. F* at 5.[4] Va. Code Ann. § 8.01-26 sets forth the types of claims that may be assigned. Specifically, "only those causes of action for damage to real or personal property, whether such damage be direct or indirect, and causes of action *ex contractu* are assignable." *Id.* Plaintiffs allege neither a tort nor a contract claim on behalf of the individual PSPs. Instead, they allege a breach of a statutory duty

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[4] Despite numerous discovery requests for copies of Plaintiffs' Services Agreements, which the Assignments purport to amend, Plaintiffs have produced only Ex. F, which appears to be a blank form of a 2000 agreement.

under § 206 of the Telecommunications Act of 1996. First Am. Compl. at ¶ 42.

In Virginia, a cause of action for violation of a statutory duty may not be assigned. *See American Title Ins. Co. v. Burke & Herbert Bank & Trust Co.*, 813 F. Supp. 423, 429 n.7 (E.D. Va. 1993) ("In Virginia, therefore, a cause of action for violation of § 4-302 cannot be assigned, for it is neither a tort cause of action for damage to real or personal property nor a contract cause of action; it is a cause of action for breach of a statutory duty."). Since APCCS does not hold valid assignments under Virginia law, it not only lacks standing but also is not even an appropriate nominal plaintiff.

CONCLUSION

For the foregoing reasons, AT&T requests that its Motion to Dismiss be granted and that the Court dismiss the claims of all Plaintiffs except Peoples Telephone Company for lack of standing. In the alternative, AT&T requests that the claims by Plaintiff APCCS be dismissed for lack of a valid assignment.

Respectfully submitted,

/s/ Clifford J. Zatz

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D.C. Bar No. 431218

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CORPORATION

Dated: January 8, 2003

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	**CASE NO.: 1:99 CV 696 (ESH)**
Plaintiffs,	)	
v.	)	
AT&T CORPORATION,	)	
Defendant.	)	

ORDER DISMISSING
ASSIGNEE PLAINTIFFS' CLAIMS

(Filed Jan. 8, 2003)

The Court, having considered Defendant AT&T Corporation's Motion to Dismiss Assignee Plaintiffs' Claims, Plaintiffs' Response thereto and AT&T's Reply, finds that Plaintiffs lack standing under Article III, Section 2 of the United States Constitution to pursue the claims set forth in the Amended Complaint and therefore GRANTS AT&T's Motion.

IT IS ORDERED THIS ___ day of ___ 2003, that the claims of Plaintiffs APCC Services, Inc, Data Net Systems, LLC, Jaroth, Inc., NSC Telemanagement Corporation, and Davel Communications Group, Inc. as set forth in the Amended Complaint are hereby DISMISSED.

Honorable Ellen Segal Huvelle
United States District Court Judge

EXHIBIT E

O'Keefe Ashenden Lyons & Ward
A Partnership Including
Professional Corporations

Henry T. Kelly *HKelly@oalw.com*

December 16, 2002

THIS CORRESPONDENCE CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO THE COURT'S PROTECTIVE ORDER.

VIA FACSIMILE

Clifford Zatz
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
Suite 400
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

RE: Certification of counsel relating to APCC and Plaintiffs' PSP-Customers' responses to AT&T's discovery requests, *APCC Services, Inc., et al. v. AT&T Corporation*, 99 CV 00696.

Dear Mr. Zatz:

In our November 27,2002 letter to you regarding the production of materials from APCC Services customers, we indicated that we would follow-up with additional information on the names and numbers of PSPs that responded to AT&T's requests. In our previous letter we indicated that there were approximately 1400 PSPs that are customers of APCC Services for which a claim has been made in the

litigation, and that approximately 700 PSPs had responded. Those numbers are incorrect.

Attached please find two spreadsheets listing the names of the PSP customers that responded to AT&T's discovery requests. One spreadsheet lists the PSP customers of APCC Services, the other spreadsheet lists the PSP customers for Data Net Systems. This information is marked as "confidential – attorneys eyes only."

APCC Services originally had approximately 1266 PSP customers that were identified in the original complaining. As AT&T knows, the actual number of active PSPs that bill for dial around compensation varies from month to month. In the 2nd Quarter 2002, APCC Services processed dial-around compensation for 855 litigants. There were 322,810 litigation ANI's billed by these 855 litigants in the 2nd quarter, 2002. The reduction in the number of PSP customers (that have assigned their claims to APCC Services) is probably due to consolidations, companies going out of business, or other reasons.

To be clear, APCC Services sent AT&T's discovery requests to all 1266 PSP customers. Five hundred thirty-two (532) of the PSPs for which a claim has been made in the litigation responded to AT&T's discovery requests. It is difficult to calculate a *percentage* of companies responding to AT&T's requests (as we tried to do in our November 27, 2002 letter) because the number of companies for which a claim has been made evolves over time. The APCC Services

customers for which responses were made total 233,964 ANIs (182,042 ANIS identified on the attached spreadsheet, plus 51,922 ANIs for Davel.)

Data Net Systems sent AT&T's discovery requests to 84 of its customers. Twenty-eight of the DNS customers produced information responsive to AT&T's requests. Attached is a spreadsheet identifying those customers, and the number of ANI's relating to those customers during the most recent quarter.

Sincerely,

/s/ Hank Kelly [cb]
Hank Kelly

HTK:cb

cc: Special Master Richard a. Levie
Shana L. Malinowski
Hall Adams, III, Esq.
Michael W. Ward, Esq.
Jeffrey J. Ward, Esq.
Edward R. Moor, Esq.
Colleen M. Coyle, Esq.
Beth H. Wilensky, Esq.

EXHIBIT F

APCC SERVICES AGENCY COMPENSATION AGREEMENT

Payphone Service Provider (PSP):_____

Address: _____

_____

Federal Tax ID: _____

Authorized Contact: _____

E-mail:_____

Telephone:_____

Fax: _____

Approximate number of payphones:_____

CHECK HERE IF YOU USED ANOTHER SERVICE TO COLLECT DIAL AROUND IN THE PAST _____

Service: PSP hereby appoints APCC SERVICES as its exclusive agent for billing and collection, including routine, ordinary course of business dispute resolution with respect to "Dial Around Compensation" ("DAC"), subject to the "Terms and Conditions" portion of this Agreement.

Fees: Monthly processing fees according to the rate set forth on Schedule A, unless (i) APCC SERVICES and PSP have agreed in writing to another compensation rate, or (ii) a revised Schedule A is accepted as set forth below. All fees, expenses, and applicable taxes (if any) shall be deducted by APCC SERVICES from any collections on behalf of PSP prior to disbursement.

In the event of any material change in the basis, structure or amount of compensation due from inter-exchange carriers (IXCs) generally to PSPs generally, whether pursuant to statutory, regulatory, judicial or commercial action, APCC SERVICES shall continue to receive compensation from PSP as provided in Schedule A until thirty (30) days after APCC SERVICES shall have delivered (as set forth in Section 8(b) of the Terms and Conditions) to PSP a revised Schedule A. Any such revision shall be subject to APCC SERVICES's sole discretion. Within such thirty (30) day period, PSP shall either notify APCC SERVICES that it is terminating this Agreement as of the thirtieth day of such period, or the revised Schedule A compensation for APCC SERVICES shall be deemed accepted by PSP as of the thirtieth day for collections received by APCC SERVICES thereafter.

Billing SERVICES Schedule: (i) PSP will provide APCC SERVICES with updated Data Forms within 15 days following the end of each calendar quarter; (ii) APCC SERVICES will submit a bill to all IXCs that APCC SERVICES has reason to believe such IXCs are liable for DAC (including any and all IXCs identified by PSP) on a schedule consistent with industry practice; (iii) APCC SERVICES will pay by check or ACH amounts collected from IXCs (less deductions for APCC SERVICES's fees, expenses and taxes as provided in this Agreement) with accompanying statement to PSP within approximately 115 days after the end of the calendar quarter provided IXC payment and data are received within normal industry timeframes; and (iv) if additional DAC

collections from IXCs are received by APCC SERVICES which were not included on the first payment to PSP for the calendar quarter, and the total of such collections is at least an average of $2 per phone per month for the aggregate customer base of APCC SERVICES, then APCC SERVICES will make a second disbursement to PSP which will include such additional collections from IXCs approximately 160 days after the end of the calendar quarter.

Term of Agreement: The term of this Agreement shall commence upon APCC SERVICES's execution of this Agreement ("Effective Date") and, except as otherwise provided in the Terms and Conditions, shall expire three years from the Effective Date. This Agreement and the fees set forth on the then-current Schedule A shall be automatically renewed for a period of one year on the third anniversary date of its execution, and on each anniversary date thereafter, unless renewed, extended or terminated by PSP or APCC SERVICES, as provided in the Terms and Conditions.

IN WITNESS WHEREOF, and of the "Terms and Conditions" and Schedule A attached hereto, the undersigned have entered into this Agreement effective this _____ day of _____, _____.
Year

APCC SERVICES, INC. PSP

_____ _____
Signature of Officer

Title:_____ Title:_____

This Agreement is subject to the "Terms and Conditions" attached hereto, and to Schedule A attached hereto, each of which is incorporated herein by reference. The Power of Attorney attached hereto must be signed by an officer of PSP and a witness and returned with this contract.

Contract Revisions 1/1/2000

_____

Initials of PSP Officer

TERMS AND CONDITIONS

1. Definitions.

   (a) "Agreement" shall mean this "APCC SERVICES Agency Compensation Agreement", including these Terms and Conditions and Schedule A.

   (b) "APCC" shall mean American Public Communications Council, Inc., a District of Columbia corporation with its principal place of business at 10302 Eaton Place, Suite 340, Fairfax, Virginia 22030.

   (c) "APCC SERVICES" shall mean APCC SERVICES, Inc., a Virginia corporation with its principal place of business at 10302 Eaton Place, Suite 340, Fairfax, Virginia 22030.

   (d) "DAC" shall mean (i) "Dial Around Compensation" to which PSP is entitled by virtue of the FCC orders in FCC Docket No. CC 96-128 (or any subsequent order of the FCC), as

such compensation may be adjusted from time to time hereafter, or any comparable order issued by a state governmental authority, or (ii) "Dial Around Compensation" otherwise paid by IXCs.

(e) "Data Forms" shall mean the forms or formats provided or approved by APCC SERVICES for delivery to APCC SERVICES from PSP of the data necessary for APCC SERVICES to perform its services under this Agreement. APCC SERVICES may require that data be provided by electronic media, such as floppy disk or CD-ROM in a particular form or format designated by APCC SERVICES.

(f) "FCC" shall mean the Federal Communications Commission.

(g) "IXC" shall mean an inter-exchange carrier or other carrier from which PSP is entitled to collect DAC.

(h) "PSP" shall mean a payphone service provider that is the person, corporation, or other entity entering into this Agreement.

(i) "Taxes" shall mean all federal, state, or local taxes levied or based on any charges or services provided hereunder, but excluding any taxes based on APCC SERVICES's income.

2. Power of Attorney. PSP will execute the Power of Attorney forms attached hereto, and any other documents requested from time to time by APCC SERVICES, for the purpose of documenting or facilitating

APCC SERVICES's exclusive authority to bill and collect DAC on behalf of PSP.

3. Billing Disputes. APCC SERVICES will make reasonable efforts to resolve billing or collection disputes that arise in the ordinary course of business of collecting DAC from IXCs. APCC SERVICES agrees to provide PSP with a quarterly report of all disputed Automatic Number Identifiers ("ANIs") as reported by IXCs. PSP shall promptly provide APCC SERVICES with all documentation that APCC SERVICES believes to be necessary in order to resolve a dispute with an IXC. APCC SERVICES shall not be obligated to attempt to resolve any dispute that cannot be addressed with reasonable effort in the ordinary course of business, and shall have no obligation to initiate any legal proceeding for collection from an IXC.

4. Limitations on Liability of APCC SERVICES

(a) APCC SERVICES does not warrant any result as to its performance hereunder, and APCC SERVICES's sole obligation shall be to exercise reasonable diligence with respect to the services to be performed hereunder. Notwithstanding any other provisions of this Agreement or any duty, express or implied, which may be asserted based upon the terms and conditions of this Agreement or statutory or common law, APCC SERVICES's sole liability to PSP hereunder shall be for acts of willful misconduct by APCC SERVICES or its employees or agents or intentional breach

of this Agreement. PSP expressly acknowledges that APCC SERVICES is acting solely as agent for PSP and third parties may not assert claims against APCC SERVICES.

(b) APCC SERVICES shall be under no obligation to verify any information contained on a Data Form, or to provide billing and collection services in the event that any Data Form currently held by APCC SERVICES is incomplete or inaccurate.

(c) Under no circumstances shall APCC SERVICES be liable to PSP for any amount in excess of DAC collected by APCC SERVICES on PSP's behalf, net of fees, expenses and taxes, if any, as described in this Agreement. APCC SERVICES shall not be required to pay to PSP any interest earned by APCC SERVICES on DAC collected by APCC SERVICES before forwarding of DAC to PSP in accordance with this Agreement.

(d) The DAC collected by APCC SERVICES shall be held in financial institutions selected by APCC SERVICES in its sole discretion or in any investment grade instrument customarily used by agents holding client funds. APCC SERVICES shall segregate the DAC collected from other accounts maintained by APCC SERVICES at such institution or in such instrument (but not, necessarily, from DAC collected by APCC SERVICES for other PSPs pursuant to Agreements similar in form to this Agreement). Under no circumstances shall APCC

SERVICES be liable to PSP for any losses resulting from a failure of a financial institution to the extent that such losses are not covered by deposit insurance.

(e) In the event that APCC SERVICES is made subject to any order or directive of any court, administrative agency, governmental body or other entity which APCC SERVICES reasonably believes imposes upon APCC SERVICES the legal obligation to forward amounts collected on PSP's behalf to any person or entity other than PSP, then APCC SERVICES shall promptly notify PSP of such order or directive, but under no circumstances shall APCC SERVICES be liable to PSP for any amounts collected by APCC SERVICES on PSP's behalf and forwarded to such other person or entity. In the event of a dispute between PSP and any third party regarding the ownership or disposition of funds collected on behalf of PSP hereunder, APCC SERVICES may deposit such funds with the clerk of a court of competent jurisdiction or APCC SERVICES may establish an escrow account for disputed funds, pending mutually acceptable resolution of or final judgment with respect to such dispute. Interest on any escrow account shall be paid to APCC SERVICES. In the event APCC SERVICES deems it necessary to retain legal counsel to represent it in any court proceeding involving PSP and any third party, where PSP or the third party has named APCC SERVICES as a party to the litigation, APCC SERVICES may charge PSP the reasonable attorneys'

fees and costs incurred by APCC SERVICES in such litigation.

(f) (i) APCC SERVICES shall exercise reasonable and customary efforts to maintain the confidentiality of all information provided to APCC SERVICES by PSP in connection with APCC SERVICES's duties hereunder, whether such information is contained on a Data Form or otherwise. However, nothing in this Agreement or otherwise shall subject APCC SERVICES to any liability for compliance with any order for records or information pertaining to PSP or otherwise from any court, administrative agency, or governmental body. APCC SERVICES shall promptly notify PSP in the event that it receives any such order.

(ii) subject to (f)(i) above, APCC SERVICES may use information contained on the Data Forms or otherwise provided to APCC SERVICES for the purpose of dues calculation by APCC or to analyze and present such information, in the aggregate, for advocacy of public policy by APCC or related parties or to determine the feasibility of other services to be provided by APCC SERVICES.

(iii) APCC SERVICES may also change certain information contained on the Data Forms to reflect changes in area codes associated with a PSP's ANI's, provided that APCC SERVICES shall have no obligation to make such changes.

(h) APCC SERVICES's duty to perform services under this Agreement shall be suspended due to any material cause or condition beyond its reasonable control, including but not limited to acts of God or the public enemy, riots or civil disorders, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, shortages of labor or materials, freight embargoes, unusually severe weather, breakdowns, electrical power failures, operational failures, communication failures, unavoidable delays, failure of PSP to provide timely and accurate Data Forms in the format supplied by APCC SERVICES, or other similar causes. APCC SERVICES shall not have liability for any losses, expenses or damages, ordinary, special, or consequential, resulting directly or indirectly from such causes.

5. Responsibilities of PSP

(a) PSP shall review all Data Forms for accuracy before submission to APCC SERVICES, and each such submission shall constitute a representation and warranty of PSP to APCC SERVICES that the information contained therein is accurate in all material respects and does not reflect any activity other than routine pay telephone usage by bona fide customers. PSP shall use reasonable efforts to update the information contained in the Data Forms on a regular basis and PSP shall be solely responsible for any claims or losses arising from PSP's failure to provide such

updated Data Forms. If PSP submits information necessary for APCC SERVICES to perform its obligations hereunder by computer diskette or by electronic means, such diskette transmission shall be free of computer viruses and PSP shall compensate APCC SERVICES fully for any and all losses incurred by APCC SERVICES arising from any computer virus introduced by PSP.

(b) All data obtained by APCC SERVICES from PSP, from other customers or from its own sources, and all DAC collection methods and processes, computer programs, customer or billing lists and related compilations of data constitute trade secrets and confidential information (the "Confidential Information") of APCC SERVICES. PSP shall not seek to acquire any such Confidential Information, and if PSP shall acquire such Confidential Information by any means, PSP shall not use or disclose such Confidential Information and shall promptly return such Confidential Information to APCC SERVICES.

(c) Any assignment of the amounts collected by APCC SERVICES hereunder to any party other than PSP ("Assignment") shall be authorized only by execution of a Notice of Assignment provided by APCC SERVICES. PSP shall be solely responsible for notifying APCC SERVICES that such Assignment has been revoked or terminated. APCC SERVICES shall accept such Assignment solely as an accommodation to PSP and shall have no liability to any party with respect to the

commencement of or termination of any Assignment payment whatsoever. PSP's sole remedy for amounts improperly paid to an Assignee shall be to institute action against such Assignee.

(d) In the event that APCC SERVICES inadvertently forwards to PSP an amount in excess of the amounts due to PSP under this Agreement, PSP shall promptly refund such excess to APCC SERVICES. Alternatively, and in any event APCC SERVICES may, in its sole discretion, withhold such excess from future payments otherwise due to PSP.

6. Termination

(a) The term of this Agreement shall commence upon APCC SERVICES's execution of this Agreement ("Effective Date") and, unless sooner terminated as provided in Section 6(b) below, shall expire on the later to occur of (i) the date three years from the Effective Date, or (ii) the date on which APCC SERVICES has remitted to the PSP all DAC collected by APCC SERVICES from the IXCs on behalf of the PSP (less amounts deducted by APCC SERVICES pursuant to this Agreement) relating to amounts billed for the last calendar quarter covered by the term of this Agreement. This Agreement shall be renewed automatically for a period of one year (subject to the provision of (ii) above) on the third anniversary date of its execution, and on each subsequent anniversary date thereafter, unless either party shall notify the other

party of its intention to not renew this Agreement, such notice to be given not less than 30 days and not more than 90 days prior to such anniversary date.

(b) APCC SERVICES may terminate this Agreement upon thirty days written notice to the PSP for any reason. PSP may terminate this Agreement within thirty (30) days after delivery of a new Schedule A or upon thirty (30) days written notice for any material breach by APCC SERVICES of its express obligations under this Agreement, with such notice specifying the nature of such breach, provided, that, if within thirty (30) days APCC SERVICES has cured such breach, the Agreement shall not be terminated. PSP's right to terminate this Agreement upon breach by APCC SERVICES shall be the exclusive remedy for breach of this Agreement except for willful misconduct by APCC SERVICES, its employees or agents.

(c) Following termination or expiration of this Agreement, APCC SERVICES shall continue to disburse funds to PSP that are due to PSP as such funds are received by APCC SERVICES from IXC, less any fees, expenses, or taxes due APCC SERVICES under this Agreement and subject to APCC SERVICES disbursement schedule.

7. Indemnification PSP shall indemnify, defend and hold harmless APCC SERVICES from and against any claims, demands, actions, damages, losses, liabilities and expenses, including reasonable fees and

expenses of counsel, arising in any manner out of the subject matter of this Agreement including, without limitation (i) actions arising in whole or in part due to any material breach of this Agreement by the PSP brought or asserted by any third party; (ii) any action brought by an IXC alleging APCC SERVICES's excessive billing of DAC on behalf of PSP; or (iii) any action by an Assignee with respect to payments allegedly due to Assignee. The indemnification obligations described in this paragraph shall survive the termination of this Agreement. Any amounts that become due to APCC SERVICES pursuant to the operation of this paragraph may, at the discretion of APCC SERVICES, be deducted from amounts collected on behalf of PSP.

8. Miscellaneous

(a) This Agreement may not be sold, assigned, or transferred by PSP without prior written approval of APCC SERVICES, which approval shall not be unreasonably withheld or delayed. APCC SERVICES may freely assign any part or all of its rights and obligations under this Agreement to any other person or entity.

(b) Any notices to be given hereunder shall be in writing and shall be deemed to have been duly and properly given after confirmation of receipt of such notice, via services used in the ordinary course of business (including overnight express service or facsimile with time-stamped receipt and copy by regular mail), addressed to the person signing this

Agreement on behalf of each party at the address given herein, or to such other person at such other address as a party hereto may designate in writing to the other party hereto from time to time.

(c) This Agreement (consisting of the APCC SERVICES Agency Compensation Agreement, Terms and Conditions and Schedule A hereto, as revised if applicable) constitutes the entire agreement between the parties with respect to the subject matter hereof and all prior agreements and representations of the parties respecting the subject matter hereof, whether written or oral, are merged herein and shall be of no further force or effect.

(d) This Agreement may only be amended by a writing executed by each party hereto. Upon execution of this Agreement, PSP has agreed to the terms contained in this printed form Agreement. *PSP may not vary or alter the terms contained in this printed form Agreement by making changes to the printed form. Any changes to this printed form Agreement shall be effective only if the initials of an authorized officer of APCC SERVICES and of PSP appear directly beside each such revision to this printed form Agreement.* No course of dealing or failure of any party to strictly enforce any term, right or condition of this Agreement shall be construed as a waiver of such term, right or condition.

(e) In the event that any dispute concerning this Agreement should arise between the parties hereto, the parties agree to consult with one another on a good faith basis to attempt to resolve such dispute, and, at the discretion of the parties, to seek third-party mediation, prior to taking any action to terminate this Agreement or to the commencement of any other legal action.

(f) If any portion of this Agreement is invalid or unenforceable for any reason, then the remainder of this agreement shall continue in full force and effect, excepting only the invalid or unenforceable portion of this agreement.

(g) This Agreement shall be construed in accordance with the laws of the Commonwealth of Virginia (but not the law of conflicts of law) pertaining to contracts to be performed therein. PSP expressly agrees that the jurisdiction and venue for trial of any cause of action, claim, suit or litigation filed against APCC SERVICES with respect to this Agreement shall be Fairfax County, Virginia.

(h) Nothing expressed or implied herein is intended or will be construed to confer upon any person, firm or corporation, other than the parties hereto, any right or remedy hereunder or by reason hereto as a third party beneficiary or in any other capacity.

(i) APCC SERVICES, in its sole discretion, may take whatever actions it deems necessary to protect its interests and reputation in the

telecommunications industry in the event APCC SERVICES has reasonable grounds to believe that (1) PSP has provided any inaccurate information to APCC SERVICES in order to increase the amount of DAC claimed by PSP above that which PSP lawfully is entitled to receive, or (2) PSP seeks to collect DAC for any calls for which PSP is not entitled to receive DAC.

_____

Initials of PSP Officer

SCHEDULE A

APCC SERVICES DIAL-AROUND COMPENSATION PROGRAM RATE STRUCTURE

Effective 7/1/2002

1. Set-up Fees: $50 per Company *(1-25 Payphones)*
   $250 per Company *(26+ Payphones)*

2. Fees: Fees based upon organizational memberships are as outlined below. The dial around fees outlined below will be assessed on each ANI submitted by PSP to APCC SERVICES for each month PSP instructs APCC SERVICES to bill and attempt to collect compensation for such ANI.

(1)	(2)	(3)	(4)
APCC/SPP Member	**APCC Only**	**State Assn. Member Only**	**APCCS Customer Only**
Per ANI: 35 cents	Per ANI: 45 cents	Per ANI: 70 cents	Per ANI: 85 cents

MEMBERSHIP CATEGORIES:

1. APCC/SPP Member: A member of a state association participating in the APCC State Partnership Program (SPP).

2. APCC Only: A Company that is a member in good standing of APCC but does not belong to any state association participating in the APCC State Partnership Program (SPP).

3. State Association Member: A Company that does not belong to APCC, but does belong to one or more state associations

4. APCCS Customer Only: A Company that does not belong to APCC and does not belong to a state association.

Instructions for Completing Power of Attorney Document

Important: The following two pages (The Power of Attorney) must be completed correctly by all companies that use our Dial-Around collection services. Follow these instructions to fill out this document.

PAGE 8 – Power of Attorney (P.O.A.) for National Payphone Clearinghouse

- **"Undersigned Payphone Services Provider" (first blank) – fill in your company's full legal name.**

PAGE 9 – P.O.A. for National Payphone Clearinghouse (con't)

- **"Owner" (lower right side of page) is your complete company name. This name should match the company name as it appears in the first blank on page 8.**
- **"By": Signature of the owner of your company.**
- **"Print Name": The owner's printed name.**
- **"Title": The owner's title (i.e. President, Owner, etc.)**
- **"Owner's Address": Your company's address. Please print clearly.**
- **"Attest" (lower left side of page) is the signature of a legal witness (anyone over the age of 18). *This does not have to be notarized.***
- **"Print Name": The printed name of the witness.**
- **"Title": The title of the witness (i.e. administrative assistant, spouse, etc.)**
- **"Date": The date you are filling out the Power of Attorney.**

PAGE 10 – Power of Attorney for APCC Services

- **First blank on top of page: Your company name as it appears on page 8**

- **Second blank: Your company type (corporation, partnership, or sole proprietorship)**
- **"Company Name" (lower right of page): Should match your company name as it appears on page 8**
- **"By" (lower right side of page): Signature of company officer, followed by printed name and title**
- **"Attest" (lower left side of page): Signature of witness, followed by printed name and title**

ALL BLANKS MUST BE COMPLETED. THIS FORM MAY NOT BE CHANGED OR AMENDED. FAILURE TO COMPLETE AND RETURN THIS FORM MAY DELAY PAYMENT OF COMPENSATION.

POWER OF ATTORNEY

The undersigned payphone services provider,

_____("Owner"),
YOUR COMPANY NAME

and the undersigned aggregator, **APCC SERVICES, Inc.** ("Aggregator"), hereby agree as follows for their own benefit and for the benefit of Cincinnati Bell Telephone Company d/b/a National Payphone Clearinghouse ("CBT"):

1. Recitals.

1.1 Owner is a payphone services provider and is entitled under applicable law to receive compensation for completed calls using Owner's payphones.

1.2 CBT operates a clearinghouse operation under the name "National Payphone Clearinghouse" to facilitate the payment of compensation due to Owner and other payphone services providers.

1.3 Aggregator is in the business of collecting and submitting data on behalf of Owner to the National Payphone Clearinghouse ("NPC") and of receiving and distributing Owner's compensation received through the NPC.

2. Appointment. Owner hereby appoints Aggregator, and Aggregator hereby accepts such appointment, as Owner's true and lawful attorney-in-fact with full power and authority in the place and stead of Owner or in Owner's name to take any and all action and to execute any and all documents which may be necessary or desirable in connection with Owner's receipt of compensation through the NPC and, without limiting the generality of the foregoing, Owner hereby gives Aggregator the power and right, on behalf of Owner to do the following:

2.1 to submit data, records and other information of Owner demonstrating Owner's eligibility for compensation through the NPC;

2.2 to receive funds due to Owner that are paid through the NPC, and to receive related reports and documentation from the NPC;

2.3 to settle or compromise any disputes relating to compensation due to Owner paid through the NPC; and

2.4 generally to do all acts and things which Aggregator deems necessary to effect the intent of this Power of Attorney, as fully and effectively as Owner might do.

3. Agreements. Owner and Aggregator acknowledge and agree as follows:

3.1 CBT will incur no liability to Owner or Aggregator (a) as a result of the failure of Aggregator or Owner to furnish accurate and timely data to the NPC; or (b) by acting upon any data, request for compensation, notice or other communication from Aggregator or Owner that appears on its face to be in order or that CBT reasonably believes to be genuine.

3.2 CBT will not be liable for any payments made by it in good faith based on the data submitted by Aggregator or Owner, and if any such payment is subsequently determined to have been made in error, the sole recourse of any person or entity to whom payment is due, but not made, will be to recover from the recipient of such payment.

4. Termination of Power of Attorney. This Power of Attorney will remain in effect until CBT receives

written notice of termination from Owner or Aggregator. Any termination with respect to Manager will not affect this Power of Attorney with respect to Aggregator. Any termination with respect to Aggregator will not affect this Power of Attorney with respect to Manager. Termination notices must be sent to the following address:

National Payphone Clearinghouse
201 East Fourth Street, 102-980
Cincinnati, Ohio 45201-2301
Attn: Operations Manager

5. Governing Law. This Power of Attorney will be governed by Ohio Law.

ATTEST:

_____
WITNESS SIGNATURE

Print Name: _____

Title: _____

Date: _____, _____
year

OWNER:

_____
YOUR COMPANY NAME

By: _____
OFFICER'S SIGNATURE

Print Name: _____

Title: _____

Owner's Address:
(Company Address)

_____

_____

_____

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that

_____

COMPANY NAME

a _____ (corporation/partnership/ proprietorship), hereinafter referred to as the "Company", hereby appoints APCC SERVICES, Inc. ("APCC SERVICES") as its true and lawful attorney-in-fact for the purpose of exercising the following powers:

1. To do all acts necessary for the purpose of billing and collecting amounts due to the Company pursuant to the Federal Communications Commission Order of October 9, 1997, in FCC Docket No. CC 96-128 (or any subsequent FCC order), such amounts being known as "Dial-Around Compensation" and referred to herein as "DAC," specifically including receipt of DAC funds on behalf of the Company.

2. To enter into any discussions or other activities to resolve any dispute concerning the payment of DAC to the Company, and to settle or compromise any such dispute on behalf of the Company.

3. To receive and compile all documentation necessary to carry out the foregoing purposes, including copies of lists of all of the Company's Payphone Service Providers as prepared by any and all local exchange companies.

Company specifically acknowledges and confirms that: (i) no person or entity who shall pay to APCC SERVICES amounts relating in any way to DAC owed to the Company shall be liable to Company to the extent of any amounts so paid, unless the person or entity making such payment has actual knowledge that the authority granted to APCC SERVICES by this Power of Attorney has been properly revoked; and (ii) the Company has represented and warranted to APCC SERVICES that information provided by the Company with respect to DAC owed to the Company is accurate in all material respects.

IN WITNESS WHEREOF, Company has caused this Power of Attorney to be executed and delivered by a duly authorized officer of the Company, to be effective this ___ day of _____, _____, until revoked in writing by the Company with actual notice to the party relying upon this Power of Attorney.

_____
COMPANY NAME

ATTEST:

By:_____
WITNESS SIGNATURE

Print Name: _____

Title:_____

By:_____
OFFICER'S SIGNATURE

Print Name:_____

Title:_____

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	No. 1:99CV00696 (ESH)
	)	[Referred to
Plaintiffs,	)	Special Master Levie]
	)	
v.	)	
	)	
AT&T CORPORATION,	)	
	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO AT&T CORPORATION'S MOTION TO DISMISS

Plaintiffs, APCC SERVICES, INC., ("APCCS"), DATA NET SYSTEMS, L.L.C., JAROTH, INC., d/b/a PACIFIC TELEMANAGEMENT SERVICES, NSC TELEMANAGEMENT CORPORATION, and DAVEL COMMUNICATIONS GROUP, INC., respectfully state as follows in response to the motion to dismiss filed by AT&T:

I. INTRODUCTION

Four years into this litigation AT&T has raised, for the first time, a challenge regarding the standing that five of the six Plaintiffs have to maintain this suit. The lateness of AT&T's challenge is an indicator

of its hollowness.[1] Consideration of the merits of AT&T's claim that the aggregator Plaintiffs do not have a sufficient "stake" in this litigation in light of the day-to-day workings of the telecommunications industry since the Telecommunications Act of 1996 was implemented by the Federal Communications Commission ("FCC"), and in light of the assignments and powers of attorney executed by the PSPs relative to this case, shows that AT&T's argument is base sophistry. In the normal course of business relating to payphone compensation AT&T cuts checks to the aggregator Plaintiffs, not to the independent payphone service providers ("PSPs") that Plaintiffs represent, to satisfy its statutorily imposed dial-around-compensation obligations, when it chooses to honor them at all. Similarly, in the normal course of business AT&T and its billing and collection agent, the National Payphone Clearinghouse ("NPC"), have routinely instructed Plaintiffs that they will only deal with aggregators, and not PSPs, in handling billing disputes. Plaintiffs are thus not only the assignees and attorneys in fact of the PSPs they serve, but are, as a result of the demands of both the FCC and AT&T, the ongoing representatives of their member PSPs in all matters dealing with the subject matter of

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[1] The identical argument AT&T makes here was summarily rejected in *American Public Communications Council, Inc. v. Allnet Communication Services, Inc.*, 1993 WL 544300 (D.D.C. 1993), *vacated on other grounds*, 959 F. Supp. 19 (D.D.C. 1997) (vacated after settlement). See discussion at p. 13 *infra*.

this suit: the payment, or non-payment, of dial-around-compensation.

AT&T's motion should be denied for many reasons. The Plaintiffs are the assignees and attorneys in fact of the damage claims of the PSPs they serve and have standing as a result of the assignments. Further, even without the assignments, the Plaintiffs have standing to bring this suit because they are entities, created pursuant to the FCC's suggestion and AT&T's demands, that manage the collection of dial around collection, which is at issue in this lawsuit and, therefore, have representational standing. Lastly, AT&T's citation to a Virginia statute which it claims bars the assignment of the dial-around-compensation claim from PSPs to the Plaintiff APCCS is inapposite, but even if the statute did apply to this case, which it does not, the assignments would be proper.

II. FACTS

This suit seeks the collection of dial-around-compensation that AT&T owes the PSPs for completed access code and toll free calls made from PSP payphones and carried over AT&T's telephone network facilities. The Plaintiffs allege, and will ultimately prove, that AT&T has undercounted completed calls and has otherwise under-compensated the PSPs that the Plaintiffs represent. The Plaintiffs filed this action on behalf more than one thousand PSP companies that own and operate over 400,000 public payphones

located throughout the United States. (See First Amended Complaint, at III, incorporated by reference as if fully set forth herein). The First Amended Complaint, at Exhibits A through E, listed each of the PSPs on whose behalf suit was brought. In subsequent discovery, the Plaintiffs have produced copies of the assignments and powers of attorney that were executed by the PSPs listed in Exhibits A through E of the complaint and which authorized the prosecution of this suit by Plaintiffs.

A. THE FCC SUGGESTED THAT BILLING AND COLLECTION BE CENTRALIZED

The aggregator Plaintiffs are clearinghouses who were created at the suggestion of the FCC to streamline the billing and collection of dial-around-compensation from interexchange carriers ("IXCs") like AT&T. In implementing § 276, the FCC recognized that billing and collection agents like the Plaintiffs could do this and encouraged the establishment and use of organizations such as the Plaintiffs. In the first Order issued by the FCC in implementing the Congressional mandate that PSPs be compensated for all dial around calls, the FCC wrote at paragraph 110 that:

> "110. We conclude that we should adopt a direct-billing arrangement between IXCs and PSPs, once tracking capabilities are in place, that would build on the arrangement established in the access code call compensation proceeding, with the addition of the requirement that these carriers must send back to

each PSP a statement indicating the number of toll-free and access code calls that each carrier has received from each of that PSP's payphones. This arrangement places the burden of billing and collecting compensation on the parties who benefit the most from calls from payphones – carriers and PSPs. For this reason, we conclude that it would not be appropriate to burden LECs with the administration of the per-call compensation mechanism, because their economic interest in the compensable calls is significantly less than that of the IXCs and PSPs. While PSPs could be efficient administrators of a compensation mechanism, we conclude that the carriers already responsible for tracking the calls and paying compensation for them have the greatest ability and incentive to establish the most efficient means of administering the payment of compensation. As with the tracking of calls, carrier-payors **are free to use clearinghouses, similar to those that exist for access code call compensation,** or to contract out the direct-billing arrangement associated with the payment of compensation. We decline to leave it to the individual states to administer compensation, as suggested by SDN, because **we believe the parties can agree on a solution more efficient** than the likely varying approaches adopted by each of the states."

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128,

Report and Order, Docket No. 96-128, 11 FCC Rcd. 20,541 (September 20, 1996) (footnotes omitted; emphasis added) (hereinafter referred to as the "*First Order*").

The "access code call compensation" proceeding referred to by the FCC in the *First Order* was a prior proceeding in which independent pay telephone operators were ordered to unblock access codes (calls which allowed a caller access to an IXCs network or operators), and in return were to receive compensation for access code calls made from their payphones. In that proceeding, the FCC also required direct billing between the PSPs and IXCs or Operator Service Providers ("OSPs"), and suggested that centralized clearinghouses be used to accomplish this. Thus, the FCC wrote in *In the Matter of Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation,* 7 FCC Rcd 3251 (May 8, 1992) (emphasis added), at ¶ 49 that:

> "49. We now affirm our tentative conclusion that compensation should be administered through direct billing and/or payment arrangements between PPOs [independent pay telephone owners] and OSPs [operator service providers]. Particularly in light of our decision to prescribe a per-phone compensation rate, a direct billing/remittance mechanism should be relatively simple to administer. At the same time, this mechanism gives OSPs and PPOs the incentive and ability to adopt billing and payment procedures that minimize transaction costs and **maximize**

> **the efficiency with which bills are sent and/or payments are made**. Thus, for example, PPOs are free to determine for themselves the frequency with which to send compensation bills. In addition, PPOs and OSPs are free to agree that bills are not necessary, as United suggests, and that OSP payment obligations can be established without a PPO bill. **PPOs and/or OSPs are also free to retain the services of one or more clearinghouses to assist them with billing and collection and/or payment."**

As a result of the FCC's requirement for efficient direct billing arrangements, the payphone owners, working in coordination with AT&T and other carriers, created the aggregator organizations, which were the most efficient means by which member PSPs billed OSPs like AT&T for access code dial-around-compensation. That arrangement was carried over into the instant proceeding after the passage of the Telecommunications Act of 1996. Thus, for over ten years, the real-world practice of the parties before this Court has been, pursuant to the suggestion of the FCC, and the approval of AT&T, that the vast majority of PSPs deal with AT&T and other IXCs through the Plaintiff aggregators, and not individually.

B. THE SYSTEM

The Plaintiff aggregators have always had a power of attorney to deal with IXCs like AT&T on a daily basis. (Ex. A, Affidavit of Ruth Jaeger, Ex. B,

Affidavit of Ed Kilb, Ex. C, Affidavit of Lin Harvey, Ex. D, Affidavit of Sean Venezia, Ex. E, Affidavit of Thomas Keane).[2] The aggregators facilitate the billing of AT&T for dial-around-compensation by collecting lists of payphone ANIs owned by their PSP customers. (See Exhibits A, B, C, D, and E). The Plaintiffs submit lists of payphone ANIs to AT&T's collection agent, the NPC.[3] The NPC compares the submitted lists with lists of payphones supplied by the LECs, and then, using call data supplied by AT&T, tells AT&T how much it owes each PSP for the payphone ANIs it has verified. The NPC collects AT&T's payment and then wires it to the Plaintiff aggregators. (Exhibits A, B, C, D, and E). The Plaintiffs then distribute the dial-around-compensation to their member PSPs. The NPC, AT&T's agent, also sends the Plaintiffs a list of disputed ANIs, that is ANIs for which there is a question as to the identity of the owner or a question as to whether the ANI was active in the relevant quarter.

Nationally, the vast majority of PSPs are involved in this system through aggregators, primarily the Plaintiffs. This structural and economic arrangement,

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[2] Exhibits A to E attached hereto are facsimile copies of the Affidavits of Ruth Jaeger, Ed Kilb, Lin Harvey, Sean Venezia and Thomas Keane. The original Affidavits will be maintained by Plaintiffs' counsel.

[3] This Court has already found that the record in this case shows that the NPC is the agent of AT&T. *Special Master Memorandum Opinion and Order #1,* at p. 11 (June 28, 2002).

whereby PSPs' interests are handled and managed by the Plaintiffs, is also mirrored in the policy arena where the parent corporation of the APCCS, for instance, has participated in the argument and briefing of almost every issue before the FCC relative to payphone compensation over the last ten years. AT&T has never challenged either the standing of the APCC to speak for PSPs, nor has it ever challenged the right of the APCCS or any other aggregator to bill and collect payphone compensation on behalf of the PSPs.

C. AT&T DEMANDS THAT ALL BUSINESS BE CONDUCTED WITH THE AGGREGATORS

Further, AT&T, and its agent the NPC, have repeatedly instructed both PSPs and the aggregators that all demands for payment, and all questions concerning disputed ANIs, are to come from the Plaintiffs, and not the PSPs. (Ex. A, Jaeger). It is well known in the day to day workings of the payphone compensation system that AT&T does not want to deal with individual PSPs. AT&T instructs PSPs to use an aggregator company in order to obtain the dial-around-compensation owed to them. (Ex. A, Jaeger, Ex. B, Kilb, Ex. C, Harvey, Ex. D, Venezia, and Ex. E, Keane). Even if an APCCS PSP customer wanted to deal with AT&T directly it could not do so. AT&T does not even permit companies such as APCCS to publish the telephone number of the

AT&T representative who handles the dial-around-compensation issues. (Exhibit A, Jaeger).

AT&T's agent, the NPC, advises aggregators that they are the intermediary between the NPC and PSPs, must collect dial-around-compensation from PSPs, must distribute dial-around-compensation to the PSPs, and that they must handle dispute resolutions. (See, *e.g.*, Ex. F, National Payphone Clearinghouse Aggregator Requirements and Qualifications, as executed by Data Net, attached).

The Plaintiffs invest substantial time, money and energy in collecting the dial-around-compensation owed to their member PSPs by AT&T under § 276, and they also invest considerable energy in contesting AT&T's failure to pay the full amount of dial-around-compensation owed.

D. THE PLAINTIFFS HAVE THE SAME GOAL AS THE PSPs AND ARE DEPENDENT ON THEIR SUCCESS IN COLLECTION DIAL-AROUND-COMPENSATION

The purpose of the Plaintiff organizations is to secure full payment of dial-around-compensation from the IXCs. The PSPs rely on the Plaintiffs to achieve this goal. In addition to the billing and collection duties undertaken by Plaintiffs, Plaintiffs have a financial stake in the business and profitability of their subscriber PSPs. The aggregator's compensation for billing and collection activities is based upon the number of payphones and telephone lines its PSPs

have active in any billing quarter. (Ex,. A, Jaeger, Ex. B, Kilb, Ex. C, Harvey, Ex. D, Venezia, and Ex. E, Keane). To the extent that the PSPs and the payphone industry is not profitable due to systematic undercounting or under-compensation, the business of the Plaintiffs is likewise threatened. The Plaintiffs also undertake other activities in the telephone industry for which they are compensated. For example, APCCS customers can submit data about their telephones, such as address and location, which APCCS makes available to the advertising companies.

Those companies then pay the payphone provider a fee for the advertising, a portion of which goes to APCCS. (Exhibit A, Jaeger).

III. ARGUMENT

A. THE PLAINTIFFS HAVE STANDING BY VIRTUE OF THE ASSIGNMENTS

The concept of standing is one of justiciability – whether a plaintiff has made out a sufficient "case or controversy" between himself and the defendant within the meaning of Article III. *Warth v. Seldin,* 422 U.S. 490, 498-99 (1975). The elements of constitutional standing are that the plaintiff suffer an "injury in fact" which is actual and concrete, that there is a causal connection between the injury and the conduct complained of, and that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

An assignee stands in the shoes of its injured assignor by virtue of the assignment and thus has standing to sue on the matter assigned because the assignee is asserting the injury-in-fact of its assignor, even where the assignee has not suffered an injury giving rise to the litigation. *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens,* 529 U.S. 765, 774 *(2000), citing Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962); *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.,* 339 U.S. 827 (1950); and *Hubbard v. Tod,* 171 U.S. 474 (1898).

The holding of *Vermont Agency* is dispositive here. In *Vermont Agency,* the Supreme Court expressly held that a named plaintiff, with no direct injury of his own, could maintain suit because plaintiff had what amounted to an assignment from the United States Government, which did suffer a direct injury, so that the named plaintiff had "representational standing." *Vermont Agency,* 529 U.S. at 773-774. In *Vermont Agency,* a qui tam suit was brought against a Vermont state agency under the False Claims Act ("FCA"). The named plaintiff, an individual named Stevens, was suing in the name of the United States, termed a "relator," to remedy an injury suffered by the United States – the Vermont agency's submission of false claims to the Environmental Protection Agency regarding various federal grant programs administered by the EPA. Under the FCA, the United States is entitled to intervene in the action. If it does not, the relator continues the action and receives a portion of the monies recovered plus

fees and costs. *Vermont Agency,* 529 U.S. at 769-70. In *Vermont Agency,* the United States had not intervened.

The Supreme Court addressed a challenge to Stevens' standing to maintain the suit. The Court found that Stevens had suffered no direct injury himself, and reiterated, as AT&T did in its motion, that "Article III judicial power exists only to redress or otherwise to protect against injury ***to the complaining party***." *Vermont Agency,* 529 U.S. at 771-772 (*citing Warth v. Seldin,* 422 U.S. 490, 499 (1975) (emphasis in original)). The Court noted that the FCA gave Stevens the right to bring suit in the name of the United States, and noted that the statute gave Stevens a right to recover a fee out of the United States' recovery in the suit. *Vermont Agency,* 529 U.S. at 772. The Court found that the fact that the FCA gave Stevens, the relator, the right to a portion of any recovery he obtained for the United States was ***not*** grounds on which Article III standing could be found because the right to a fee was an interest in the claim that was unrelated to the injury in fact upon which suit was brought. *Vermont Agency,* 529 U.S. at 772. The Court wrote that an Article III interest must "consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Vermont Agency,* 529 U.S. at 772 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). Thus, the Court found that Stevens, as AT&T alleges here, had no personal injury at stake in the litigation as defined by Article III.

Nevertheless, the Court found that Stevens had Article III standing to maintain suit by virtue of an assignment:

> "We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claims has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits, – and also suits by subrogees, who have been described as "equitable assign[ees]." We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

Vermont Agency, 529 U.S. at 773-4 (citations omitted).

Vermont Agency controls the outcome here and compels a finding that the aggregator Plaintiffs, as assignees of the PSPs – who have clearly suffered the injuries at issue – have standing to sue.

Since *Vermont Agency*, other federal courts have recognized that *Vermont Agency* expressly holds that the assignment from an injured party satisfies the "injury" inquiry for standing. Thus, in *Paoloni v. Goldstein*, 200 F.R.D. 644 (D.Col. 2001), the court, citing *Vermont Agency*, held that those named plaintiffs in the suit who had taken assignments from buyers who had been defrauded, but who had not

themselves suffered injury, had standing to maintain suit on the basis of the assignments for monetary damages. Similarly, in *Fla. Dept. of Ins. v. Chase Bank of Texas Nat'l Ass'n,* 274 F.3d 924, 929 (5th Cir. 2001), the court wrote, citing *Vermont Agency,* that "[i]f the plaintiff is not the party who sustained the concrete and particularized injury for which a remedy is sought, and is not the assignee or designated representative of the injured party, then it does not have standing."

Courts rarely question the standing of assignees to pursue assigned claims. For example, in the heavily litigated field of antitrust law, one court noted that "it is commonplace for individual persons claiming antitrust injury to assign their claims to an association formed for the specific purpose of pursuing litigation." *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp.,* 995 F.2d 425, 437 (3d Cir. 1993), *citing "Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Lab,* 460 U.S. 150 . . . (1983) (trade association of retail pharmacists pursued Robinson-Patman Act claims as assignee of claims of its individual members); *Chiropractic Coop. Ass'n of Michigan v. American Medical Ass'n,* 867 F.2d 270 (6th Cir. 1989) (association brought monopolization claims that had been assigned to it by individual chiropractors); *Hahn v. Oregon Physicians' Service,* 786 F.2d 1353 (9th Cir. 1985) (podiatrists formed corporation to which they assigned their antitrust claims)."

Importantly, this Circuit had noted, well before *Vermont Agency* was decided, in the form of a concurring opinion by Judge Bork, that an association bringing a suit for monetary damages could avoid a determination that it lacked standing to maintain suit on behalf of its members under the elements of "associational standing" as enunciated in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977), by taking an ***assignment*** of the member's rights. *Telecommunications Research & Action Center v. Allnet Communication Services, Inc.,* 806 F.2d 1093, 1098 (D.C.Cir. 1986). That is precisely what has happened in this case.

The only authority AT&T cites for the proposition that a "mere assignee of the right to sue" does not have Article III standing is *Connecticut v. Physicians Health Servs. Of Conn., Inc.,* 287 F.3d 110 (2d Cir. 2002). The holding in that case is based upon and limited to ERISA law. Immediately prior to the *Connecticut v. Physicians Health* case another federal court, in a non-ERISA setting, noted that "I have not found[ ] any instance in which a court denied a litigant standing to pursue a third party's claim where it had been assigned the claim pursuant to a valid contract." *Paoloni v. Goldstein,* 200 F.R.D. 644, 647 (D. Col. 2001).

The *Connecticut v. Physicians Health* case is inapposite because it is a narrow holding based on a peculiar set of facts in the heavily regulated field of ERISA law. Section 502 of ERISA strictly defines the classes of people who may file civil enforcement

actions. The Second Circuit had held that the list enumerated in section 502 was exclusive. *Chemung Canal Trust Co. v. Sovran Bank/Maryland,* 939 F.2d 12, 14 (2d Cir. 1991). The Second Circuit later carved out a narrow exception to that rule for healthcare providers to whom a beneficiary had assigned his claim in exchange for health care. *I.V. Servs. of Am., Inc. v. Trustees of Am. Consulting Eng'rs Council Ins. Trust Fund,* 136 F.3d 114, 117, n.2 (2d Cir. 1998). The plaintiff in *Connecticut* did not fit within that narrow exception of whom, other than the legislatively designated parties, were proper ERISA plaintiffs. The concept of "standing" in the ERISA cases was one concerning which parties had been designated by the legislature as proper ERISA plaintiffs. *Connecticut v. Physicians Health* cannot be interpreted to have broader application as its holding is tied to the ERISA statute.

More importantly, the court in *Connecticut v. Physicians Health* was simply wrong in its analysis of *Vermont Agency.* The *Connecticut v. Physicians Health* court's reasoning is based upon language of the Supreme Court taken out of context that, when read in context, holds precisely the opposite of what the *Connecticut* court asserts. *Connecticut* distinguished *Vermont Agency* on the basis that the plaintiff in *Vermont Agency,* who would recover a bounty if successful – but who otherwise had no stake – had a "concrete private interest in the outcome of [its] suit." 287 F.3d at 118, *citing Vermont Agency,* 529 U.S. at 772. But that quote is taken out of context. The

Supreme Court actually stated that the plaintiff's interest in the bounty was ***not*** what resulted in Article III standing:

> There is no doubt, of course, that as to this portion of the recovery – the bounty he will receive if the suit is successful – a *qui tam* relator has a 'concrete private interest in the outcome of [the] suit.' *Lujan, supra,* at 573, 112 S.Ct. 2130. But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing . . . The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right . . . A *qui tam* relator *has suffered no such invasion* – indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails . . . As we have held in another context, however, an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes . . . "

Vermont Agency, 529 U.S. at 772-3 (citations omitted, emphasis added).

The fact that the *Vermont Agency* plaintiff did not have his own interest was precisely the reason that the Supreme Court analogized the False Claims Act to an assignment. It was the assignment of the United States' injury – not the plaintiffs stake in a future and contingent bounty – that resulted in a

finding of standing. The fact that the *Connecticut v. Physicians Health* court misapprehended the Supreme Court's holding completely undermines any precedential value *Connecticut v. Physicians Health* might otherwise have relative to this case.

Lastly, this Court has previously summarily rejected the identical argument AT&T is raising in *American Public Communications Council, Inc. v. Allnet Communication Services, Inc.*, 1993 WL 544300 (D.D.C. 1993), *vacated on other grounds,* 959 F. Supp. 19 (D.D.C. 1997) (vacated after settlement). (See Exhibit G, attached). While the *Allnet* decision is obviously not binding precedent on this Court in light of the unpublished status of the opinion and its subsequent history, the holding and logic supporting the holding are sound and were based on the same fact pattern present here.

In *Allnet,* the plaintiff sued, as here, to recover dial-around compensation that Allnet owed the plaintiffs member PSPs (then referred to as "PPOs"). Allnet challenged Plaintiffs standing to bring suit as an aggregator. Finding that the defendant's argument *lacked credibility,* the Court ruled as follows:

> "Defendant challenges plaintiffs standing based on a contention that plaintiffs members are not PPOs, whom the May 8 Order entitles to compensation. Plaintiff, however, has provided a list of over 700 PPOs with whom it had executed agreements to collect dial-around compensation or powers of attorney at the time it presented its first invoice

> to Allnet. . . . Plaintiff has also presented invoices instructing defendant to pay money to plaintiff, which are the subject of this suit. . . . Thus, defendant *cannot argue credibly that plaintiff lacks standing* to sue for payment on those invoices."

1993 WL 544300 at *1 (emphasis added).

While Plaintiffs acknowledge that the *Allnet* opinion is only a slip opinion, which was subsequently vacated because the case settled, the Plaintiffs respectfully suggest that the logic of the *Allnet* Court is sound and is rooted in the realities of the structure of the telecommunications industry as that structure pertains to the compensation of PSPs by the IXCs. The logic of *Allnet* is as valid today as when decided, and is at least an indication that the credibility of AT&T's position is open to question.

B. AT&T's ATTACKS ON THE VALIDITY OF THE ASSIGNMENTS FAIL

1. There is no factual basis for AT&T's arguments

One representation of "fact" that AT&T parades in its motion as evidence that the assignments fail to give Plaintiffs standing is the assertion that that the assignments are conditional because, claims AT&T, the PSPs can withdraw the assignment at any time. This argument has no factual basis. All of the assignments at issue are identical. (See Group Exhibit H, exemplar assignments drawn from those produced

in discovery, assigning the dial-around-compensation claim to each Plaintiff). The assignments provide that each PSP assigning its rights, to APCCS for instance, is bound "by final determinations in court or regulatory proceedings prosecuted by APCCS in the Company's interest'." (Ex. H, Assignments at ¶ 2). The same language appears in each Plaintiffs' assignments. The assignment goes on to provide that the APCCS has the authority on behalf of the PSP to sign:

> " . . . settlement agreements, releases, or other documents relating to the settlement of DAC [dial-around-compensation] claims. Company hereby agrees to be bound by any settlement, compromise or release reached by APCCS on its behalf and that any document executed in connection with any such settlement, compromise or release reached by APCCS on its behalf and that any document executed in connection with any such settlement, compromise or release by APCCS on behalf of the Company shall be binding on the Company."

(Ex. A to AT&T's Motion to Dismiss at paragraph 3, and see Group Exhibit H).

The Assignment also goes on to provide that no company (i.e. AT&T) who pays amounts to APCCS, for instance, in any way relating to dial-around-compensations owed to the PSP signing off on the assignment will be liable to the PSP to the extent of payments made unless the payor has actual knowledge that the assignment has been revoked, which

cannot happen without the written consent of APCCS. (Ex. A to AT&T's Motion to Dismiss at paragraph 4, and see Group Exhibit H). The paragraph provides that "[t]his Assignment and Power of Attorney (which is coupled with an interest) may not be revoked without the written consent of the attorney-in-fact." (Ex. A to AT&T's Motion to Dismiss at paragraph 4, and see Group Exhibit H). Thus, the plain terms of the Assignments provide that the PSPs cannot unilaterally withdraw their assignments at any time contrary to AT&T's claim on page 8 of its Memorandum. As the language of each of the Plaintiffs' assignments are identical, the above argument apply to all of the Plaintiffs.

2. AT&T's argument that the number of PSPs who bill in any quarter changes is not relevant to Plaintiffs' standing

AT&T also argues that the fact that the number of active PSPs who bill for dial-around-compensation changes quarterly means that the aggregator Plaintiffs lack standing. This argument has nothing to do with standing, but, rather, with damages: a PSP must have had its payphones on line in order for its phones to be used and thus potentially earn dial-around-compensation.

The aggregator Plaintiffs have attached the list of PSPs they represent to the complaint. The fact that within any quarter a particular PSP may not have

been active, or that a particular PSP may have had changes in the number of payphone lines it had in operation, or that a particular PSP did not make a claim for dial-around-compensation during a quarter, or that one PSP bought another, means only that the amount of dial-around-compensation which that PSP will be entitled to may change by quarter, as documented on the ANI lists the Plaintiffs submit to AT&T in the normal course of business. AT&T is fully aware of these changes in circumstances as the quarterly claims for compensation are submitted to AT&T with this information in the normal course of business.

3. AT&T's argument that the determinations of this Court will not be final and bind the PSPs is contradicted by the plain language of the assignments

AT&T asserts that should the case be decided in its favor that the PSPs "might later argue" that the doctrines of res judicata and collateral estoppel do not apply because the PSPs were "not parties to the litigation." (See p. 8 of AT&T's Memorandum). The question, of course, is not what an errant PSP may argue in the future (which is only a matter of speculation), but is, instead, whether AT&T can bind the hypothetically errant PSP by the decisions rendered in this matter. The answer to this legal question is found in the language of the assignments, quoted above. The PSPs, in assigning their rights to the

aggregator Plaintiffs, agreed to be bound by final determinations in this proceeding (at paragraph 2), agreed to be bound by any "settlement, compromise or release" executed by APCCS on behalf of the PSP (at paragraph 3), and agreed that they cannot re-seek amounts paid by the defendant in this suit to them (at paragraph 4).

AT&T's argument, which asserts that PSPs can freely appear and disappear within the litigation has no basis in fact. The Plaintiffs have identified those PSPs on whose behalf suit is brought in Exhibit A through E attached to the First Amended Complaint. None of the PSPs have asked APCCS to revoke their assignment. (Ex. A, Affidavit of Ruth Jaeger). However, were a PSP to seek to revoke its assignment, which has not occurred, this would require that the Plaintiffs seek leave to amend their complaint, an event over which this Court would have control.

4. AT&T's argument that "it is unclear" whose name should be on a settlement check or release is incredible

AT&T's other arguments as to alternative "demonstrated" grounds for lack of standing are similarly lacking. AT&T claims that, without naming the individual PSPs, it is not "entirely clear" whose claims are being pursued, and that it is not sure who proper payees would be for any settlement check. This argument is disingenuous: AT&T has no such concern when it routinely causes its agent, the NPC,

to wire dial-around-compensation payments directly to the bank accounts of the Plaintiff aggregators *in the name of the Plaintiff aggregators.*

5. AT&T's (new) claim that it cannot counter-claim is groundless

AT&T's claimed concern about prosecution of its compulsory counterclaims must also be rejected.

First, AT&T has already asserted its mandatory counter-claim against the Plaintiffs, without ever raising an issue as to the propriety of doing so, and without ever attempting to interplead the PSPs. AT&T has thus waived this argument.

Further, in the normal course of business AT&T routinely claims (and in fact unilaterally recoups) setoffs for what it views as overcompensation to PSPs through these Plaintiffs. AT&T has never before questioned whether Plaintiffs were the proper parties to assert setoffs against, and cannot credibly express that concern now. Indeed, Plaintiffs in this suit are litigating and will continue to litigate whether AT&T is entitled all of the setoffs it has already asserted against Plaintiffs' PSPs in the normal course of business relative to its obligations to dial-around-compensation obligations. Lastly, these Plaintiffs have not raised any defense or objection that they are not the proper party against whom the counterclaims should be asserted. The language of the assignments clearly provides that the PSPs are bound by any decision

reached by the Court, or by the terms of any settlement.

In general, AT&T's arguments, summarized above, ignore years of general law of assignments as well as the actual facts of this case and the language of the assignments. AT&T's protestations are also baseless in light of the history of these parties' relationship. The assignments for each PSP have been produced to AT&T and the assignments indicate the individual names of the assignors. There is no mystery as to whose claims are being pursued. AT&T has historically paid ***to the aggregator Plaintiffs*** the amounts due to the individual PSPs, and the aggregator Plaintiffs have historically submitted lists of payphone ANIs for compensation. There has never been a concern that the PSPs would not recover the amounts due or would seek again compensation already paid, and there is not any such actual concern now.

C. PLAINTIFFS WOULD HAVE STANDING EVEN IF THERE WERE NO VALID ASSIGNMENTS IN THIS CASE

Plaintiffs in this case would have standing even if there were no assignments because of the doctrine of representational standing. The United States Supreme Court has recently clarified the body of law that governs when an association or representative can sue for monetary damages even where no assignment exists.

In *Telecommunications Research & Action Center v. Allnet Communication Services, Inc.*, 806 F.2d 1093, 1098 (D.C.Cir. 1986), a nonprofit association brought suit on behalf of its members against Allnet Communications for maintaining an unlawful rate structure and sought money damages. The court addressed a challenge to the standing of the association to seek monetary damages for its members. The Court reiterated the elements of a constitutional assessment of "association standing" by quoting *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), as follows:

> "an association has standing to bring suit on behalf of its members when three conditions are met: (a) [the association's] members would otherwise have standing to sue in their own right; (b) the interests [the association] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual member in the lawsuit."

The *Telecommunications Research* court found that the first two elements were satisfied, but that the third prong of *Hunt* was not because the association was suing for monetary damages. The court, following what was at that time the controlling precedent, treated the third prong of *Hunt* as involving a question of constitutional, rather than prudential, standing. The Court noted that while the United States Supreme Court had not (then) addressed the issue, the lower federal courts had consistently held

that an association seeking monetary damages, as opposed to declaratory relief, lacked standing. *Telecommunications Research,* 806 F.2d at 1095. The court held that, while there was no *per se* rule barring an association from bringing suit for monetary damages, the case before it, which involved claims asserted on behalf of only five of the organization's twelve thousand members, was not a case in which the plaintiff association would be found to have standing.

After *Telecommunications Research* was decided, the United States Supreme Court visited the issue of whether an association could sue for monetary damages for its members in *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544 (1996). In *United Food,* the Court held that the third prong of *Hunt* was not a matter of constitutional standing, but a matter of prudential standing.

Prudential standing is a judicially self-imposed limit on the exercise of federal jurisdiction. *United Food,* 517 U.S. at 551. The Court held that the first two prongs of *Hunt* were relevant to Article III standing, and that Article III standing is established after an association could be shown to have met the first two prongs of *Hunt.* The Court explained that the concerns in the doctrine of prudential standing as expressed in the third prong of *Hunt* (that neither the claim asserted nor the relief requested requires the participation of individual member in the lawsuit):

> "may well promote adversarial intensity. It may guard against the hazard of litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity. And it may hedge against any risk that the damages recovered by the association will fail to find their way into the pockets of the members on whose behalf injury is claimed . . . Hence, the third prong of the associational standing test is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution."

United Food, 517 U.S. at 556-557 (citations omitted).

In *United Food,* the association had not secured assignments from its members, as the Plaintiffs have done in this case with their PSP customers. The case, however, is important because it shows that even if there were no valid assignments in this case, the Plaintiffs would have standing to bring suit. This is because the Plaintiffs in this case meet the first two prongs of *Hunt,* and can completely satisfy the prudential concerns that lie behind the third prong as articulated by the Court in *United Food.*

1. Plaintiffs meet the first two prongs of *Hunt*

There is no question but that any of the Plaintiffs customer PSPs would have standing alone to bring

this suit, this is the essence of AT&T's motion, and thus the first prong of *Hunt* is satisfied. The second prong is also satisfied in this case: the interests Plaintiffs seek to protect in this suit are germane to the purpose of the Plaintiff aggregators because the sole purpose of the Plaintiffs is to collect the full amount of dial-around-compensation owed to their member PSPs, a purpose which they seek to fulfill in this suit. Thus, even absent a valid assignment, the Plaintiffs have Article III standing to pursue this suit as the representatives of their PSPs.

2. The Plaintiffs meet the third prong *of Hunt* as enunciated in *United Food*

The third *Hunt* prong, a prudential concern, is also satisfied here under the test outlined in *United Food*. The individual participation of the PSPs is not required in this suit for the very reasons enunciated in *United Food*: the Plaintiffs have the records necessary to submit claims for dial-around-compensation, they have performed this function since the inception of dial-around-compensation in 1992, can perform it in this suit, and will perform this function after the suit is over. AT&T and its agent the NPC require that the PSPs submit PSP ANI list to them through the aggregators. AT&T issues payment to the aggregators. Relative to the disputed ANIs, AT&T and its agent the NPC demand that the Plaintiffs resolve the dispute. There is also no question but that the funds recovered will "find their way into the pockets of the members on whose behalf the injury is claimed" and

this is one of very the arguments AT&T makes in its motion to dismiss. Therefore, in the words of the *United Food* Court, there is no real question as to the "administrative convenience and administrative efficiency" of having the Plaintiff aggregators pursue damage claims on behalf of the PSPs and Plaintiffs would be allowed to maintain suit even if there were no valid assignments.

D. AT&T's ARGUMENT THAT THESE CLAIMS ARE NOT ASSIGNABLE TO APCCS SHOULD BE REJECTED

AT&T claims that the assignments should not be considered by this Court in determining APCCS' standing to sue because, AT&T erroneously contends, the assigned claims were not assignable. AT&T only makes this argument as to APCCS, and not as to the other Plaintiffs. AT&T's argument is based on its misguided application of the choice-of-law provision in the APCCS "Services Agency Compensation Agreement" (hereinafter the "Agreement") to the issues raised in AT&T's motion. That AT&T is not a party to the Agreement is obvious, yet in view of AT&T's arguments, noteworthy.

1. The Issue of the Assignability of a Right to be Assigned Is Determined Under Federal Law

AT&T agrees that this lawsuit is governed by § 206 of the Telecommunications Act of 1996. (47 U.S.

§ 206). The statute provides a federal cause of action for violation of the federal legislative scheme regarding dial-around-compensation claims. Federal law thus applies and a choice-of-law provision like the one found in APCCS' Agency Agreement, is, if construed to apply a state's assignability law to this federal question, ineffective.

Article III standing is a federal concern. The issue of ***assignability*** (as opposed to the construction of the terms of the assignment itself) is likewise a federal concern in federal question cases.

Thus, the federal courts that have considered this precise question have held that federal law controls the issue of whether the claim at issue is assignable. "Where a claim for relief is created by a federal statute, federal law governs the assignability of the claim." *In re National Mortgage Equity Corp. Mortgage Pool Certificates Securities Litigation,* 636 F. Supp. 1138, 1152 (C.D. Calif. 1986) (assignability of RICO treble claim is one of federal law). *See also Bluebird Partners, L.P. v. First Fidelity Bank, N.A.,* 85 F.3d 970, 973 (2d Cir. 1996) ("The federal courts have consistently determined that federal law governs the assignability of claims under the federal securities laws."); *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corporation,* 995 F.2d 425, 437 (3rd Cir. 1993) ("We believe it is also clear that the validity of the assignment of an antitrust claim is a matter of federal common law.")

Any other rule would improperly delegate to states the ability to determine the assignability (and value) of rights created by federal law. Here, Congress created the Act and created a federal cause of action to enforce the Act. *See* 47 U.S.C. §§ 206, 207, 276. The issue of whether such federal cause of action is assignable is therefore one of federal law.

2. Even If the Assignability of the Claims Could be Measured under State Law, AT&T Cannot Invoke the APCCS Choice-of-Law Provision

AT&T, who is not a party to the APCCS Agreement, has no basis to invoke a privately-contracted choice-of-law provision, even assuming it was otherwise applicable. "It stretches logic and reason to assert that non-party parties with absolutely no rights or obligations under a contract . . . should be allowed to enforce a clause against a party to the contract in later litigation." *In re Mushroom Transp. Co., Inc.*, 247 B.R. 395, 398, 399, n.4 (E.D. Pa. 2000). *See also Sealord Marine Co., Ltd. v. American Bureau of Shipping*, 220 F. Supp. 2d 260, 271 (S.D.N.Y. 2002) (defendant, who was not a party to the contract, could not enforce choice-of-law provision in that contract against plaintiff who was a party to the contract).

AT&T was not a party to any of the documents that it claims contain a choice-of-law provision that it now seeks to invoke. AT&T has no right or basis to try to "enforce" that provision vis-a-vis the plaintiffs.

Further, the choice-of-law provision, by its terms, only goes to the construction of the APCCS Agreement, and does not purport to govern whether damage claims are assignable.

3. In No Event Would the Choice-of-Law Provision Require the Application of Virginia Law

The choice-of-law provision in the APCCS Agreement, on its face, indicates that it applies only to suits between the parties to the Agreement pertaining to the contracts to be performed by the parties to the Agreement. Recall that it provides:

> "This Agreement shall be *construed* in accordance with the laws of the Commonwealth of *Virginia . . . pertaining to contracts to be performed therein.* PSP expressly agrees that the jurisdiction and venue or trial of any . . . litigation filed *against APCC Services with respect to this Agreement* shall be . . . Virginia." (emphasis added).

The Agreement pertains to the relationship between the PSPs and the aggregators and governs the contract between those two parties governing the aggregators' billing and collection services for the PSPs.

The present suit, on the other hand, is one based upon the FCC regulations and AT&T's violations of those statutes and regulations. It is not a suit between the parties to the Agreement seeking to construe the

Agreement. The present suit is not a suit "construing" the Agreement. This suit does not "pertain" to "contracts to be performed" in the Agreement. Plainly, the choice of law provision in the Agreement was intended to be applied where a dispute arises as to the construction of the contract between APCCS and the PSPs as to billing, collection, and other services provided for in the Agreement. Further proof that this provision was intended to apply only to such disputes is found in the second sentence that specifies that litigation "against APCC Services" was to be filed in Virginia. The choice-of-law provision is, therefore, inapplicable to this case.

There is another reason why AT&T's presumptive argument that Virginia law controls must be rejected. AT&T's argument for application of Virginia law is based upon paragraph 8(g) of the APCC Services Agency Compensation Agreement which provides:

> This Agreement shall be construed in accordance with the laws of the Commonwealth of Virginia (but not the law of conflicts of law) pertaining to contracts to be performed therein. PSP expressly agrees that the jurisdiction and venue or trial of any cause of action, claim, suit or litigation filed against APCC Services with respect to this Agreement shall be Fairfax County, Virginia.

For numerous reasons, this choice-of-law provision does not apply here.

AT&T's argument that the choice-of-law provision mandates application of Virginia law depends upon a leap of analysis that the provision applies to the APCCS assignments at issue. There is no proof that this provision is included within the Assignment. APCCS and the PSPs entered into an "APCC Services Agency Compensation Agreement" (the "Agreement"). Paragraph 8(g) of the APCCS Agreement is the choice-of-law provision at issue and governs only the construction of the Agreement. The PSPs later entered into an "Amendment to APCCS Services Agency Compensation Agreement." (Exhibit I). The Amendment concerns APCCS' right to act as exclusive agent for resolving the Dial-Around Compensation claims at issue in this suit. The Amendment provides that "This Amendment is subject to the 'Terms and Conditions' attached to the Agreement. . . ." (Exhibit I).

Separate from the Amendment, the PSPs signed an "Assignment and Power of Attorney" ("Assignment") that assigned "for purposes of collection all rights, title and interest of the [PSP] Company in the Company's claims, demands or causes of action for 'Dial-Around Compensation . . . due the Company. . . ." (Exhibit J). Unlike the Amendment, the Assignment *does not* explicitly state that it is subject to all Terms and Conditions of the Agreement.

In their various contract papers, the parties to these Assignments have thus indicated that they do not necessarily intend Virginia law to be applied to all aspects of their contractual relationship. For example, attached to the Agreement is a Power of Attorney.

(See Exhibit F attached to AT&T's Motion to Dismiss). The Agreement specifically references the Power of Attorney. (AT&T's Exhibit F, at p. 1 ["The Power of Attorney attached hereto must be signed by an officer of PSP and a witness and returned with this contract."]). The Power of Attorney provides that it "will be governed by Ohio Law." (AT&T's Exhibit F, p. 9 ¶5). Thus, even though the Power of Attorney was attached to the Agreement and specifically referenced in the Agreement, the parties did not contract for the Power of Attorney to be governed by Virginia law.

The assignment at issue does not specifically provide that it is subject to the terms of any of the other contract documents. The Assignment does not contain its own choice-of-law provision. AT&T's leap of logic that the Assignment is subject to the Virginia choice-of-law provision should be rejected.

4. The Claims Are Assignable Under Federal, D.C. or Virginia Law

Federal case law upholds assignability of federal statutory claims such as these. Examples abound. A small sample of the many different federal, statutory claims that have all been found assignable is: RICO treble damage claims (*In re National Mortgage Equity Corp. Mortgage Pool Certificates Securities Litigation,* 636 F. Supp. 1138, 1156 (C.D. Calif. 1986)); antitrust claims (*Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp.,* 995 F.2d 425, 437 (3d Cir. 1993));

and securities claims (V.H. *Farey-Jones v. Buckingham,* 132 F. Supp. 2d 92 (E.D.N.Y. 2001)). Federal law would permit assignment of these claims as well.

Assuming that District of Columbia law applied because it is the forum, the APCCS assignments at issue are also valid. "District of Columbia law evinces a policy of 'free assignability of claims.'" *National Union Fire Ins. Co. v. Riggs Nat'l Bank,* 646 A.2d 966, 971 (D.C. 1994). *See also Brandenburger & Davis, Inc. v. Estate of Lewis,* 771 A.2d 984 (D.C. App. 2001) (noting policy of "free assignability of claims" and holding that "it has long been recognized that an assignee may pursue legal action predicated on rights arising from an assignment."); *Richter v. Arialex Corp.,* 940 F. Supp. 353, 357-8 (D.D.C. 1996) (legal malpractice claims are assignable under District of Columbia law, under certain circumstances, even though the majority of jurisdictions prohibit assignment of malpractice claims).

Even if Virginia law was applied, the claims are assignable. AT&T's claim that Virginia law prohibits these assignments is based upon Virginia Statute 8.01-26 that provides:

> Only those causes of action for damage to real or personal property, whether such damage be direct or indirect, and causes of action ex contractu are assignable. The provisions of this section shall not prohibit any injured party or his estate from making a voluntary assignment of the proceeds or anticipated proceeds of any court award or

> settlement as security for new value given in consideration of such voluntary assignment.

The claims assigned here related directly to the PSPs' property rights and, therefore, are assignable. *In re Snead,* 1 B.R. 551 (E.D. Va. 1979).

In *Snead,* the court considered whether section 8.01-26 sanctioned the assignment of a tort claim for interference with business. The court found that, even though the statute prohibits assignment of most personal torts, it did allow the assignment of this tort claim because the right to do business is a valuable property right:

> [T]he United States Supreme Court has held the right to do business to be a valuable property right. Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819, mod. On other grounds 171 U.S. 361, 18 S.Ct. 888, 43 L.Ed. 197 (1898). See, 45 Am.Jur.2d Interference s 51. Therefore, under the Virginia statute, supra, tort claims for interference with business are assignable, the Sneads are assignees of the Corporation's tort claim.

Id. at 555.

The reasoning here is the same. The federal legislation that AT&T has violated is the basis for payment to the PSPs and is *the* method by which these parties are compensated and do business. The PSPs have assigned their individual, statutory claims to the aggregators to help them ensure that they can continue to do business at the rate prescribed by the

legislature. The Virginia statute allows assignment of such a claim.

The only authority AT&T cites for the proposition that this section prohibits these assignments is *American Title Ins. Co. v. Burke & Herbert Bank & Trust Co.*, 813 F. Supp. 423 (E.D. Va. 1993). That case is factually distinguishable and the sentence quoted by AT&T was merely dicta in a footnote of the opinion.

In *American Title,* the holder, transferee and assignee of a payee brought an action against the payor bank for its untimely dishonor and return of checks. American Title's claim was based upon a Commercial Code section that established strict time limits within which a bank must take actions on checks presented for payment. Under the statute, the bank is held strictly liable for the failure to meet that "midnight deadline" requirement. *Id.* at 426. The court entered summary judgment for the bank, however, because "American Title [was] not an entity to which [the bank] [was], in the statute's terms, 'accountable' for the failure to meet the midnight deadline." *Id.* at 427. Importantly, the assignment occurred *after* the midnight deadline had passed and the assignment occurred "with full knowledge that [the checks] had been dishonored for insufficient funds." *Id.* at 428.

The holding in the case related to the timing of the assignment and the assignee's knowledge at the time of assignment. The portion of the case that

AT&T cites is a footnote explanation of why the court rejected American Title's reliance on a Wisconsin case. It was dicta and not binding precedent. *See e.g. Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 897 (D.C. Cir. 1992) (analysis that is "not determinative of the result" is dicta; binding circuit law "comes only from the holdings of a prior panel, not from its dicta."); *Rasul v. Bush*, 215 F.Supp. 2d 55, 72, n. 16 (D.D.C. 2002) (dicta "is not persuasive and not binding.").

IV. CONCLUSION

The facts and the law do not support AT&T's motion. Therefore, the motion should be denied.[4]

WHEREFORE, Plaintiffs, APCC SERVICES, INC., ("APCCS"), DATA NET SYSTEMS, L.L.C., JAROTH, INC., d/b/a PACIFIC TELEMANAGEMENT SERVICES, NSC TELEMANAGEMENT CORPORATION, and DAVEL COMMUNICATIONS GROUP,

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[4] Even if AT&T's arguments were correct, which they are not, the remedy sought by AT&T is not proper. The PSPs have been specifically identified since the inception of the suit, AT&T has conducted discovery against them, so that were the Court to grant AT&T's motion the proper relief would be to allow the cumbersome amendment of the complaint to add each of the more than 1400 PSPs from whom Plaintiffs have taken assignments as parties plaintiff. F.R.Civ.P. 15(c) and 17. In addition to being proper, for all of the reasons discussed in this Response, the manner in which the plaintiffs are now denominated is obviously preferable to this alteration from the standpoint of judicial economy.

INC., by counsel, respectfully request that this Court deny AT&T's motion to dismiss. The Plaintiffs further pray for any other relief that this Court deems just.

ROSS, DIXON & BELL, LLP

By: /s/ Jeffrey J. Ward
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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	
Plaintiffs,	)	
	)	No. 1:99CV00696
v.	)	
AT&T CORPORATION,	)	
Defendant.	)	

AFFIDAVIT OF RUTH JAEGER

I, Ruth Jaeger, an adult of sound mind, would testify to the following from my personal knowledge if called to do so at hearing in this case:

1. That I am Vice President & General Manager of the APCC Services, Inc. ("APCCS"), one of the parties to the complaint in the above captioned case.

2. In 1992, the Federal Communications Commission entered an order requiring that interexchange carriers ("IXC") and Operator Service Providers (OSPs) compensate payphone service providers (PSPs) for operator service calls originating from pay telephones. An example of an operator service call is one where an end user dials "0+area code+765-4321" or "1-800-call-ATT" and pays for the call via a calling card or credit card. The FCC ordered IXCs and OSPs to compensate PSPs a total of $6.00 per phone per month, divided among the largest IXCs and OSPs. Under the original order, there were approximately

14 IXCs and OSPs that had an obligation to pay PSPs a pro rata share of the $6.00 per phone per month. After this order was adopted, PSPs began to use aggregators to process dial-around compensation claims made to IXCs, including AT&T. AT&T and PSPs worked to develop the process by which aggregators, such as APCC Services, could process dial-around compensation requests.

3. When the FCC issued its order in 1996 requiring additional compensation to be paid to PSPs, the number of potential payors responsible for paying PSPs grew from approximately 14 to over 700.

4. The billing and collection process that has been in place since the Telecommunications Act of 1996, and which is modeled on the dial-around-compensation collection procedures adopted by the industry in the access code call proceeding in the early 1990s, is as follows. IXCs, like AT&T, are required to compensate payphone providers for certain calls that originate front payphones on a quarterly basis. PSPs submit, quarterly, to APCCS a list of pay telephone numbers ("ANI's") that are in operation and managed by the PSPs. APCCS combines the ANI listing for its customers into a single computer file, and delivers that computer file to AT&T's agent, NPC (as well as other IXCs, such as Sprint and Worldcom.) The NPC verifies, from lists provided by local exchange carriers ("LECs"), that the ANIs submitted for compensation are phone lines that the LECs have assigned to pay telephones and then, using call data supplied by AT&T, the NPC tells AT&T how much it

owes each PSP for the payphone ANIs it has verified. The NPC collects AT&T's payment, combines this payment with payments from other payers, and then wires the total compensation to APCCS with information of how much is payable to each PSP. APCCS then combines the payment from AT&T and other IXCs that make payments to APCCS, and delivers those payments to each PSP. APCCS collects a fee from its PSP customer to process these bills, and to process the payment information back to the PSP, based upon the number of payphone telephone lines its PSPs have active in any given quarter. APCCS has had, since the time it began acting as an aggregator for the PSPs it serves, a power of attorney enabling it to collect dial-around-compensation from the IXCs directly on behalf of its PSPs. This power of attorney is in addition to the assignment and power of attorney that the PSPs had given to APCCS prior to the initiation of this lawsuit against AT&T.

5. Occasionally, the NPC, on behalf of AT&T, will "dispute" an ANI submitted for payment. When an ANI is disputed the NPC, and thus AT&T, will withhold payment to a PSP until the "dispute" is resolved. There are several alleged reasons why an ANI is disputed. For example, if two different PSPs claim compensation is due to them for the same ANI, the NPC may refuse to pay either PSP. If a local exchange carrier does not submit a list of ANIs that are identified as "payphone lines", NPC will dispute the ANI's submitted by the PSP and not pay compensation owed from AT&T.

6. The PSPs do not deal directly with AT&T or its agent the NPC in relation to billing and collection issues, or in relation to "disputed" ANIs. All such dealings are directed through the APCCS. The submissions for compensation, and the payments made by IXCs, are exchanged on a aggregated basis between APCCS and the NPC.

7. APCCS represents the vast majority of the thousands of independent PSPs operating in the United States. APCCS currently bills about 700 potential payors and collect from over 100 payors that are required to pay compensation to those PSPs.

8. Most carriers that APCC Services bills owe compensation to PSPs, but the amounts that may be payable to each PSP in a quarter may be small. To collect all compensation that is due to a PSP without an aggregator, would require each PSP to bill all potential payors for compensation. Aggregators such as APCC Services allow payors to meet the compensation requirements in a cost-efficient manner. Several hundred APCC Services customers have between 1-5 payphones, which would make it virtually impossible for AT&T to compensate these companies for dial around calls. APCC Services submits compensation demands to IXCs on behalf of nearly two thousand PSPs, and the IXCs have to return payment in a single delivery.

9. AT&T, through its agent NPC, requires that APCCS be the direct intermediary for compensation claims made by APCCS PSPs. This has been repeatedly

communicated to me by AT&T and the NPC. Further, AT&T requires that APCCS refrain from publishing to our PSPs the telephone number of any of the AT&T representatives who handle dial-around-compensation issues or risk losing the business relationship with AT&T.

10. Disputes on whether ANIs are compensable are also resolved between the APCCS and AT&T or its agent the NPC. AT&T and the NPC have repeatedly instructed both PSPs and APCCS that all questions concerning disputed ANIs should be resolved through the APCCS, and not the PSPs.

11. APCC Services and the other aggregators (i.e. Data Net Systems), possessed the payment data from various IXCs to over 1300 PSPs that was necessary to identify which IXCs were failing to comply with the requirements of Section 276 of the Act. Individual PSPs would not have access to the payment information of other PSPs. So, for example, if an IXC such as Twister Communications (an IXC that operated in Texas) failed to pay all PSPs, any 1 PSP would never know that Twister Communications was violating its obligations under the Act (that 1 PSP would know that Twister had an obligation to pay, but would never know whether Twister did or did not pay other PSPs.) However, APCC Services, because it represented numerous PSPs, could identify that Twister, an IXC with significant dial around calls through its network, made no payment to any of its approximately 1300 PSP customers. APCC Services, in its position as an aggregator was in a position to

identify carriers that failed to meet their dial around compensation obligations.

12. The APCCS also provides its PSPs other services. One of the benefits and services that APCCS provides to its PSPs are reports and data that show customers where there are increases and decreases in payments from carriers. We also provide PSPs with telecommunications related industry information that may or may not affect their business. APCCS provides a quarterly report to PSPs about important recent development's that may affect their business. The Plaintiffs also undertake other activities in the telephone industry for which they arc compensated. For example, they assist in generating advertising income, Certain businesses want to advertise on pay telephones enclosures. APCCS customers submit data about their pay telephones, such as address and location, which APCCS makes available to the agent for the advertising companies. These agents then pay APCCS and APCCS pays the payphone provider a fee for the advertising, a portion of which goes to APCCS.

13. APCCS represents its PSPs in many other ways as well. In January 2003, for instance, APCCS filed a joint claim with the bankruptcy court handling the WorldCom bankruptcy. This joint filing, made by APCCS on behalf of its PSPs, was made after a stipulation was approved by the Court authorizing APCCS to act on behalf of its PSPs. APCCS calculated the amount of claim owing to its PSP customers, and filed a claim for this underpayment with the WorldCom estate. A copy of the court order approving

the stipulation to allow APCC Services to file claims on behalf of its PSP customers is attached hereto as Exhibit A.

14. None of the PSPs who executed the assignment and power of attorney upon which APCCS brings this suit have asked to revoke the assignment and power of attorney, and none of the assignments have been revoked.

FURTHER THE AFFIANT SAYETH NOT.

/s/ Ruth Jaeger
Ruth Jaeger

Under penalties as provided by law, I certify that the above statements are true and correct to the best of my knowledge.

/s/ Ruth Jaeger
Ruth Jaeger

[Exhibit Omitted In Printing]

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	
Plaintiffs,	)	
	)	No. 1:99CV00696
v.	)	
AT&T CORPORATION,	)	
Defendant.	)	

AFFIDAVIT OF EDWARD F. KILB

I, Edward F. Kilb, an adult of sound mind, would testify the following from my personal knowledge if called to do so at hearing in this case:

1. That I am Vice President of Data Net Systems, LLC ("DNS"), one of the parties to the complaint in the above captioned case.

2. In 1992, the Federal Communications Commission entered an order requiring that interexchange carriers ("IXC") and Operator Service Providers ("OSPs") compensate payphone service providers ("PSPs") for operator service calls originating from pay telephones. An example of an operator service call is one where an end user dials "0+area code+765-4321" or "1-800-call-ATT" and pays for the call via a calling card or credit card. The FCC ordered IXCs and OSPs to compensate PSPs a total of $6.00 per phone per month, divided among the largest IXCs and OSPs. Under the original order, there were approximately

14 IXCs and OSPs that had an obligation to pay PSPs a pro rata share of the $6.00 per phone per month. After this order was adopted, PSPs began to use aggregators to process dial-around compensation claims made to IXCs, including AT&T. AT&T and PSPs worked to develop the process by which aggregators could process dial-around compensation requests.

3. When the FCC issued its order in 1996 requiring additional compensation to be paid to PSPs, the number of IXCs that were responsible for paying PSPs grew from approximately 14 to over 350 carriers.

4. The billing and collection process that has been in place since the Telecommunications Act of 1996, and which is modeled on the dial-around-compensation collection procedures adopted by the industry in the access code call proceeding in the early 1990s, is as follows. IXCs, like AT&T, are required to compensate payphone providers for certain calls that originate from payphones on a quarterly basis. PSPs submit, quarterly, to DNS a list of pay telephone numbers ("ANI's") that are in operation and managed by the PSPs. DNS combines the ANI listing for its customers into a single computer file, and delivers that computer file to AT&T's agent, NPC (as well as other IXCs, such as Sprint and Worldcom.) The NPC verifies, from lists provided by local exchange carriers ("LECs"), that the ANIs submitted for compensation are phone lines that the LECs have assigned to pay telephones and then, using call data

supplied by AT&T, the NPC tells AT&T how much it owes each PSP for the payphone ANIs it has verified. The NPC collects AT&T's payment and then wires it to DNS with information of how much is payable to each PSP. DNS then combines the payment from AT&T and other IXCs that make payments, and delivers those payments to each PSP. DNS collects a fee from its PSP customer to process these bills, and to process the payment information back to the PSP, based upon the number of payphone telephone lines its PSPs have active in any given quarter. DNS has had, since the time it began acting as an aggregator for the PSPs it serves, a power of attorney enabling it to collect dial-around-compensation from the IXCs directly on behalf of its PSPs. This power of attorney is in addition to the assignment and power of attorney that the PSPs have DNS prior to the initiation of this lawsuit against AT&T.

5. Occasionally, the NPC, on behalf of AT&T, will "dispute" an ANI submitted for payment. When an ANI is disputed the NPC, and thus AT&T, will withhold payment to a PSP until the "dispute" is resolved. There are several alleged reasons why an ANI is disputed. For example, if two different PSPs claim compensation is due to them for the same ANI, the NPC may refuse to pay either PSP. If a local exchange carrier does not submit a list of ANIs that are identified as "payphone lines", NPC will dispute the ANI's submitted by the PSP and not pay compensation owed from AT&T.

6. AT&T, through its agent NPC, requires that the PSPs do not deal directly with AT&T or its agent the NPC in relation to billing and collection issues, or in relation to "disputed" ANIs. AT&T, through its agent NPC, requires that such dealings occur through DNS. The submissions for compensation, and the payments made by IXCs, are exchanged on an aggregated basis between DNS and the NPC.

7. DNS currently bills over 150 IXCs that are required to pay compensation to those PSPs. DNS has collected payments from over 135 IXCs.

8. Most carriers that DNS bills owe compensation to PSPs, but the amounts that may be payable to each PSP in a quarter may be small. To collect all compensation that is due to a PSP without an aggregator, would require each PSP to bill all IXCs for compensation. Aggregators such as DNS allow PSPs and IXCs to meet the compensation requirements in a cost-efficient manner. Many of DNS customers are small businesses having a small number of payphone lines, which would make it more difficult for AT&T to compensate these companies for dial around calls on a PSP by PSP basis. DNS will submit compensation demands to IXCs on behalf of over a hundred PSPs, and the IXCs have to return payment in a single delivery.

9. AT&T, through its agent NPC, requires that DNS be the direct intermediary for compensation claims made by DNS PSPs. This has been repeatedly communicated to me by AT&T and the NPC. A copy of

an agreement imposed by NPC on DNS is attached hereto as Exhibit A.

10. Disputes on whether ANIs are compensable are also resolved between the DNS and AT&T or its agent the NPC. The NPC has instructed both PSPs and DNS that all questions concerning disputed ANIs should be resolved through the DNS, and not the PSPs.

11. In January 2003, DNS filed a joint claim with the bankruptcy court handling the WorldCom bankruptcy. This joint filing, made by DNS on behalf of its PSPs, was made after a stipulation was approved by the Court authorizing DNS to act on behalf of its PSPs. DNS calculated the amount of claim owing to its PSP customers, and filed a claim for this underpayment with the WorldCom estate. A copy of the court orders approving the stipulation to allow DNS to file claims on behalf of its PSP customers is attached hereto as Exhibit B.

12. None of the PSPs who executed the assignment and power of attorney upon which DNS brings this suit have asked to revoke the assignment and power of attorney, and none of the assignments have been revoked.

FURTHER THE AFFIANT SAYETH NOT.

/s/ Edward F. Kilb
Edward F. Kilb

Under penalties as provided by law, I certify that the above statements are true and correct to the best of my knowledge.

/s/ Edward F. Kilb
Edward F. Kilb

[Exhibits A And B Omitted In Printing]

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	
Plaintiffs,	)	
	)	No. 1:99CV00696
v.	)	
AT&T CORPORATION,	)	
Defendant.	)	

AFFIDAVIT OF LIN HARVEY

I, Lin Harvey, an adult of sound mind, would testify to the following from my personal knowledge if called to do so at hearing in this case:

1. That I am an employee of of Davel Communications Group, Inc. ("Davel"), one of the parties to the complaint in the above captioned case. As such, I have knowledge of the foregoing facts, or have access to information from my employer which I have relied upon to form a belief as the statements herein.

2. The billing and collection process that has been in place since the Telecommunications Act of 1996, and which is modeled on the dial-around-compensation collection procedures adopted by the industry in the access code call proceeding in the early 1990s, is as follows. IXCs, like AT&T, are required to compensate payphone providers for certain calls that originate from payphones on a quarterly basis. During the time that Davel processed

dial-around compensation requests for its affiliated payphone service providers (PSPs) PSPs submitted, quarterly, to Davel a list of pay telephone numbers ("ANI's") that were in operation and managed by the PSPs. Davel combined the ANI listing for its customers into a single computer file, and delivered that computer file to AT&T's agent, NPC (as well as other IXCs, such as Sprint and Worldcom.) The NPC verified, from lists provided by local exchange carriers ("LECs"), that the ANIs submitted for compensation are phone lines that the LECs have assigned to pay telephones and then, using call data supplied by AT&T, the NPC advised AT&T how much it owes each PSP for the payphone ANIs it verified. The NPC collected AT&T's payment and then wired the funds to Davel with information of how much was payable to each PSP. Davel then combined the payment from AT&T and other IXCs that make payments, and accounted for those payments to each PSP. Davel had, since the time it began acting as an aggregator for its affiliated PSPs it served, a power of attorney enabling it to collect dial-around-compensation from the IXCs directly on behalf of its PSPs. This power of attorney is in addition to the assignment and power of attorney that the PSPs had prior to the initiation of this lawsuit against AT&T.

3. Occasionally, the NPC, on behalf of AT&T, "disputed" an ANI submitted for payment. When an ANI is disputed the NPC, and thus AT&T, withheld payment to a PSP until the "dispute" was resolved. There are several alleged reasons why an ANI was

disputed. For example, if two different PSPs claim compensation is due to them for the same ANI, the NPC may refuse to pay either PSP. If a local exchange carrier does not submit a list of ANIs that are identified as "payphone lines", NPC will dispute the ANI's submitted by the PSP and not pay compensation owed from AT&T.

4. The PSPs did not deal directly with AT&T or its agent the NPC in relation to billing and collection issues, or in relation to "disputed" ANIs. All such dealings occurred through Davel. The submissions for compensation, and the payments made by IXCs, were exchanged on a aggregated basis between Davel and the NPC. Sprint is the only large IXC that did not use an aggregator to receive compensation requests from PSPs and to make payments.

5. AT&T, through its agent NPC, required that Davel be the direct intermediary for compensation claims made by Davel's affiliated PSPs.

6. Disputes on whether ANIs were compensable were also resolved between Davel and AT&T or its agent the NPC.

FURTHER THE AFFIANT SAYETH NOT.

/s/ lin harvey
Lin Harvey

Under penalties as provided by law, I certify that the above statements are true and correct to the best of my knowledge.

/s/ lin harvey
Lin Harvey

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	
Plaintiffs,	)	
	)	No. 1:99CV00696
v.	)	
AT&T CORPORATION,	)	
Defendant.	)	

AFFIDAVIT OF SEAN VENEZIA

I, Sean Venezia, an adult of sound mind, would testify to the following from my personal knowledge if called to do so at hearing in this case:

1. That I am an officer of Intera Group, Inc. and its wholly-owned subsidiaries, NSC Telemanagement Corporation, n/k/a/ INTERA Communications Corporation (hereinafter "NSC"), one of the parties to the complaint in the above captioned case. As such, I have knowledge of the foregoing facts.

2. The billing and collection process that has been in place since the Telecommunications Act of 1996, and which is modeled on the dial-around-compensation collection procedures adopted by the industry in the access code call proceeding in the early 1990s, is as follows. IXCs, like AT&T, are required to compensate payphone providers for certain calls that originate from payphones on a quarterly basis. During the time that NSC processed

dial-around compensation requests for is payphone service provider (PSP) customers, PSPs submitted, quarterly, to NSC a list of pay telephone numbers ("ANI's") that were in operation and managed by the PSPs. NSC combined the ANI listing for its customers into a single computer file, and delivered that computer file to AT&T's agent, NPC (as well as other IXCs, such as Sprint and Worldcom.) The NPC verified, from lists provided by local exchange carriers ("LECs"), that the ANIs submitted for compensation are phone lines that the LECs have assigned to pay telephones and then, using call data supplied by AT&T, the NPC advised AT&T how much it owes each PSP for the payphone ANIs it verified. The NPC collected AT&T's payment and than wired the funds to NSC with information of how much was payable to each PSP. NSC then combined the payment from AT&T and other IXCs that make payments, and accounted for those payments to each PSP. NSC had, since the time it began acting as an aggregator for its affiliated PSPs it served, a power of attorney enabling it to collect dial-around-compensation from the IXCs directly on behalf of its PSPs. This power of attorney is in addition to the assignment and power of attorney that the PSPs had prior to the initiation of this lawsuit against AT&T.

3. Occasionally, the NPC, on behalf of AT&T, "disputed" an ANI submitted for payment. When an ANI is disputed the NPC, and thus AT&T, withheld payment to a PSP until the "dispute" was resolved. There are several alleged reasons why an ANI was

disputed. For example, if two different PSPs claim compensation is due to them for the same ANI, the NPC may refuse to pay either PSP. If a local exchange carrier does not submit a list of ANIs that are identified as "payphone lines", NPC will dispute the ANI's submitted by the PSP and not pay compensation owed from AT&T.

4. The PSPs did not deal directly with AT&T or its agent the NPC in relation to billing and collection issues, or in relation to "disputed" ANIs. All such dealings occurred through NSC. The submissions for compensation, and the payments made by IXCs, were exchanged on a aggregated basis between NSC and the NPC. Sprint is the only large IXC that did not use an aggregator to receive compensation requests from PSPs and to make payments.

5. AT&T, through its agent NPC, required that NSC be the direct intermediary for compensation claims made by NSC's affiliated PSPs.

6. Disputes on whether ANIs were compensable were also resolved between NSC and AT&T or its agent the NPC.

FURTHER THE AFFIANT SAYETH NOT.

/s/ M. Sean Venezia
Sean Venezia

Under penalties as provided by law, I certify that the above statements are true and correct to the best of my knowledge.

/s/ M. Sean Venezia
Sean Venezia

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	
Plaintiffs,	)	No! 1:99CV00696
	)	
v.	)	
AT&T CORPORATION,	)	
Defendant.	)	

AFFIDAVIT OF THOMAS KEANE

I, Thomas Keane, an adult of sound mind, would testify to the following from my personal knowledge if called to do so at hearing in this case:

1. That I am an officer of Jaroth, Inc., d//b/a Pacific Telemanagement Services (PTS), one of the parties to the complaint in the above captioned case. As such, I have knowledge of the foregoing facts.

2. The billing and collection process that has been in place since the Telecommunications Act of 1996, and which is modeled on the dial-around-compensation collection procedures adopted by the industry in the access code call proceeding in the early 1990s, is as follows. IXCs, like AT&T, are required to compensate payphone providers for certain calls that originate from payphones on a quarterly basis. During the time that PTS processed dial-around compensation requests for is payphone service provider (PSP) customers, PTSs submitted, quarterly,

to PTS a list of pay telephone numbers ("ANI's") that were in operation and managed by the PSPs. PTS combined the ANI listing for its customers into a single computer file, and delivered that computer file to AT&T's agent, NPC (as well as other IXCs, such as Sprint and Worldcom.) The NPC verified, from lists provided by local exchange carriers ("LECs"), that the ANIs submitted for compensation are phone lines that the LECs have assigned to pay telephones and then, using call data supplied by AT&T, the NPC advised AT&T how much it owes each PSP for the payphone ANIs it verified. The NPC collected AT&T's payment and then wired the funds to PTS with information of how much was payable to each PSP. PTS then combined the payment from AT&T and other IXCs that make payments, and accounted for those payments to each PSP. PTS had, since the time it began acting as an aggregator for its affiliated PSPs it served, a power of attorney enabling it to collect dial-around-compensation from the IXCs directly on behalf of its PSPs. This power of attorney is in addition to the assignment and power of attorney that the PSPs had prior to the initiation of this lawsuit against AT&T.

3. Occasionally, the NPC, on behalf of AT&T, "disputed" an ANI submitted for payment. When an ANI is disputed the NPC, and thus AT&T, withheld payment to a PSP until the "dispute" was resolved. There are several alleged reasons why an ANI was disputed. For example, if two different PSPs claim compensation is due to them for the same ANI, the

NPC may refuse to pay either PSP. If a local exchange carrier does not submit a list of ANIs that are identified as "payphone lines", NPC will dispute the ANI's submitted by the PSP and not pay compensation owed from AT&T.

4. The PSPs did not deal directly with AT&T or its agent the NPC in relation to billing and collection issues, or in relation to "disputed" ANIs. All such dealings occurred through PTS. The submissions for compensation, and the payments made by IXCs, were exchanged on a aggregated basis between PTS and the NPC. Sprint is the only large IXC that did not use an aggregator to receive compensation requests from PSPs and to make payments.

5. AT&T, through its agent NPC, required that PTS be the direct intermediary for compensation claims made by PTS's affiliated PSPs.

6. Disputes on whether ANIs were compensable were also resolved between PTS and AT&T or its agent the NPC.

FURTHER THE AFFIANT SAYETH NOT.

/s/ Thomas Keane
Thomas Keane

Under penalties as provided by law, I certify that the above statements are true and correct to the best of my knowledge.

/s/ Thomas Keane
Thomas Keane

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	
Plaintiffs,	)	
	)	**No. 1:99CV00696**
v.	)	
AT&T CORPORATION,	)	
Defendant.	)	

AT&T'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ASSIGNEE PLAINTIFFS' CLAIMS

I. PLAINTIFFS DO NOT MEET THE TEST FOR ARTICLE III STANDING OF THEIR OWN

Plaintiffs argue that by virtue of an assignment, a party can gain standing that otherwise does not exist. Pl. Opp. at 10-14. This is true as far as it goes. None of the cases Plaintiffs cite for this general proposition, however, address the specifics of the assignments at issue in this case. The question here is not whether an assignment *in general* can confer standing, but whether the particular Assignments in this case, which intentionally divorce injury from any stake in the outcome of the litigation, are adequate to confer standing on these Plaintiffs. Plaintiffs have not addressed that question, but the answer is clearly

that these Assignments give these Plaintiffs no standing.

Plaintiffs' Opposition ignores the fact that the Assignments they created: (a) are for purposes of collection only; (b) leave the right to any recovery with the PSPs; and (c) do not afford Plaintiffs any tangible stake in the outcome of the litigation. *See* Opening Brief at 2-3. In the only case either party has located involving such an assignment – *Connecticut v. Physicians Health Services of Ct., Inc.*, 287 F.3d 110 (2nd Cir. 2002) – the court correctly concluded that because the assignment of the claim conveyed no concrete stake in the outcome of the litigation, the assignee did not "suffer an injury of the nature that would confer standing upon it under Article III of the Constitution." *Id.* at 115. The Second Circuit's decision rested upon two key points highlighted by the Supreme Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000): (1) to create standing, an assignment must do more than assign the right to bring suit; it must also confer upon the assignee a concrete private interest in the outcome of the litigation; and (2) where, as here, the suit is brought solely for the benefit of the assignors and the benefits of the litigation flow to the assignors, the assignee lacks any personal and individual interest in the outcome of the suit and therefore has no standing under Article III. *Physicians Health,* 287 F.3d at 117-119.

In trying to distinguish *Physicians Health,* Plaintiffs present two erroneous arguments. First, Plaintiffs argue that the Second Circuit limited its decision to the issue of standing to sue *under ERISA.* Pl. Opp. at 11-12. The Second Circuit did no such thing. In fact, although the district court concluded that ERISA's civil enforcement provisions were exclusive and did not include assignees of beneficiaries, *the Second Circuit refused to address that issue. Physicians Health,* 287 F.3d at 115. Instead, the Court found that it did not need to address the ERISA issue because the assignee plaintiff in any event lacked standing under Article III of the Constitution. The sole basis for the Second Circuit's conclusion that the State did not have standing to sue as an assignee was its finding that the State did not suffer an injury sufficient to confer standing under Article III. *Id.* Accordingly, Plaintiffs' claim that *Physicians Health* should somehow be limited to construction of ERISA's enforcement provisions (Pl. Opp. at 11-12) is without merit.

Second, Plaintiffs would have the Court disregard *Physicians Health* – the only case on point – on the ground that the Second Circuit misconstrued the Supreme Court's decision in *Vermont Agency.* Pl. Opp. at 12-13. To the contrary, it is *Plaintiffs* who misconstrue the *Vermont Agency* decision.

Plaintiffs dedicate three pages to discussion of the *Vermont Agency* case, seemingly quoting all of the correct language concerning assignment of damages claims. Pl. Opp. at 10. They ignore the language of the Court's conclusion, however, and argue that under *Vermont Agency,* any assignment of the right to bring suit provides the assignee with representational standing. Pl. Opp. at 8-10. Plaintiffs' analysis misses the mark.

The Supreme Court has long held that to have standing, the Plaintiff must suffer an injury in fact *and* have a concrete private interest in the outcome of the suit. *See Lujan v. Defenders of W[illegible]life,* 504 U.S. 555, 573 (1992); *Vermont Agency,* 52[illegible] U.S. at 771-72; Opening Brief at 5. Further, the concrete private interest in the outcome of the suit must be related to the injury in fact and must consist of obtaining compensation for or preventing the violation of a legally protected right that belongs to the Plaintiff. *Vermont Agency,* 529 U.S. at 772-773. "We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized to him." *Raines v. Byrd,* 521 U.S. 811, 819 (1997). As stated by the court in *Florida Dept. of Ins. v. Chase Bank of Texas Nat'l Ass'n,* 274 F.3d 924 (5th Cir. 2001) (cited in Pl. Opp. at 10), "under *Lujan,* courts must carefully examine whose injury is at issue and to whom the recovery will go." 274 F.3d at 929. It is a

two-part analysis. Plaintiffs must demonstrate (1) injury; and (2) a concrete interest in the outcome of the litigation that is related to the injury. If either factor is missing, Plaintiffs have no standing.

The Court in *Vermont Agency* concluded that the relator had both an assignment of the damages claim and a cause of action of his own under the statute. Together, these were sufficient to confer standing under Article III. Indeed, *Vermont Agency* recognized that a key factor in all *qui tam* cases is the relator's right to share in the recovery. 529 U.S. at 773-774. Thus, the concrete stake in the outcome of the litigation was not, as Plaintiffs argue, irrelevant to the analysis; it was the central focus of the Supreme Court's conclusion in *Vermont Agency*. "[T]he necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Article III requirement." *Raines*, 521 U.S. at 819 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976)). Plaintiffs here cannot satisfy this requirement.

Physicians Health properly applied this two-part analysis (*i.e.*, injury plus stake in the outcome) when it recognized that the assignee of a "claim" may have standing to sue, but an assignee of only the right to sue does not:

> The case before us differs critically from *Vermont Agency* and *I.V. Services*. The *qui tam* relator in the former and the healthcare provider in the latter each had a concrete private interest in the outcome of the suit. That is, the outcome had the potential to affect the *qui tam* relator and healthcare provider in a 'personal and individual way.' They both stood personally and individually to recover a monetary award.
>
> * * *
>
> None of the remedies being sought would flow to the State as assignee. As the State puts it, 'this case is brought solely for the benefit of the assignors, and those similarly situated.' Even if the assignments are valid as a contractual matter, they thus merely give the state the right to act as a nominal party. . . . The State as an assignee therefore lacks standing under Article III of the Constitution.

Physicians Health, 287 F.3d at 118-119 (citations omitted).

Plaintiffs in this case do not have a concrete private interest in the outcome of the suit that would entitle them to compensation for violation of a legally protected right. Indeed, Plaintiffs voluntarily elected to have *no stake* in the outcome of the litigation when

they agreed with the PSPs that all interest in the proceeds of the litigation would remain with the latter. Opening Brief at 3. By entering into an assignment for purposes of collection only, Plaintiffs have separated injury from interest in the outcome. This form of assignment precludes the possibility that Plaintiffs could demonstrate *both* an injury and a concrete interest in the outcome of the litigation that is related to that injury.[1]

Physicians Health squares exactly with the facts presented here. By its terms, it is not limited to issues of standing under ERISA. If *Vermont Agency* is, as Plaintiffs contend, dispositive of the Article III

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[1] Plaintiffs' argument that they have a stake in the outcome of this litigation because they could lose advertising fees if PSPs go out of business (Pl. Opp. at 6-7) must be rejected outright. The Supreme Court has made it clear that the requisite interest in the litigation is an interest in compensation for the violation of a legally protected right. *Vermont Agency*, 529 U.S. at 772. Plaintiffs do not allege that AT&T violated any protected right of their own. Even if PSPs' recovery from AT&T would ultimately translate into increased advertising fees (Pl. Opp. at 6-7), this interest is far too attenuated to give rise to a cognizable injury in fact under Article III. *See Vermont Agency*, 529 U.S. at 773 ("an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes."); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 (1976) (plaintiff may not rely upon speculative inferences to connect its alleged injury to the challenged action of defendants).

standing issue (Pl. Opp. at 8, 10), it requires that the Amended Complaint be dismissed.[2]

II. PLAINTIFFS DO NOT MEET THE TEST FOR ASSOCIATIONAL STANDING

The doctrine of associational standing is not applicable here. In *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 344-45 (1977), the Supreme Court held that an association has standing only when (a) its members would otherwise have standing; (b) the interests it seeks to protect are germane to its purpose; and (c) neither the claim nor

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[2] Plaintiffs' claim that because the FCC and AT&T look to aggregators to assist in collection of dial-around compensation they also have standing to bring litigation in their own name (Pl. Opp. at 2-8) must be rejected. The aggregators' role in the conduct of ordinary business under the regulatory scheme does not give them Article III standing to bring a lawsuit. Nor does it give the Court subject matter jurisdiction over such a lawsuit. The FCC has never given a cause of action to aggregators to collect dial-around compensation and has consistently rejected APCC's call for aggregate action to resolve dial-around issues, favoring instead a direct relationship between PSPs and IXCs. *See, e.g.*, Opening Brief Ex. D, Fifth Order at ¶¶ 40, 83, 89.

Plaintiffs themselves recognized that their role in collecting payphone compensation in the ordinary course of business did not also extend to litigation on behalf of PSPs. This is demonstrated by the fact that they felt the need to amend their service contracts, sign additional powers of attorney, and take assignments from PSPs in order to bring this lawsuit.

the relief requested require participation of the individual members. *Id.* Plaintiffs cannot meet either the second or third of these criteria. Moreover, as demonstrated in Section II.C below, Plaintiffs' contention that the Supreme Court's decision in *United Food And Commercial Workers Union Local 751 v. Brown Group, Inc.* 517 U.S. 544 (1996) (hereinafter "*Brown Group*") permits an association to sue for damages absent a federal statute allowing it to do so (Pl. Op. at 19-20) is simply wrong. The law in this Circuit remains that associations may not sue for money damages on behalf of their members where, as here, individualized proof is required to prove entitlement to or the amount of damages.

A. The Interests Plaintiffs Seek To Protect Are Not Germane To Their Purpose

For decades, the Supreme Court has recognized that, under certain circumstances, an association may represent the interests of its members. *See generally Warth v. Seldin,* 422 U.S. 490 (1975). In *Hunt,* the Court was asked to determine whether a state agency was, for all practical purposes, so like a trade association that it could claim associational standing. In finding that it was, the Supreme Court analyzed the roles of both the particular organization and its members. The Court found that the state agency could have associational standing because it played the role of a traditional trade association in

promoting the industry, educating the public, and representing the members' collective views and economic interests. *Hunt,* 432 U.S. at 344. The Court also held that the state agency possessed all of the indicia of a membership organization in that the members elected the organization's officers, participation in the organization was limited to members, and members provided financing only for the organization's activities on behalf of the membership, not to profit the organization. *Id.* at 344-45.

Plaintiffs offer no such evidence here. They are *not* organizations of members who pay dues for the achievement of a collective purpose. Instead, the relationship between APCCS and the PSPs is one of service provider and customer. Plaintiffs are *for-profit* corporations that charge their customers (i.e., the PSPs) a fee for services rendered in collecting dial-around compensation from Interexchange Carriers.[3] For instance, Plaintiff APCCS is incorporated under the Virginia Stock Corporation Act, and accordingly is owned and operated by, and for the benefit of, its

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[3] Plaintiffs argue that because their purpose is to collect compensation owed to their customers, the interests Plaintiffs seek to protect are germane to their purpose and they therefore satisfy the second prong of *Hunt*. Pl. Opp. at 20-21. If it were that simple, then collection agencies would always qualify for associational standing. That is clearly not the case.

shareholders. *See* Ex. A, APCCS Articles of Incorporation. Plaintiffs and the PSPs stand in a business relationship governed by a commercial contract, which may be terminated at any time without cause. *See, e.g.,* Opening Brief at Ex. F. In short, Plaintiffs are a far cry from the traditional trade association for which the Supreme Court has recognized associational standing.[4]

While Plaintiffs place great emphasis on *American Public Communications Council, Inc. v. Allnet Comm. Svcs., Inc.,* 1993 WL 544300 (D.D.C. 1993) – a case in which APCC, Inc., not Plaintiff APCCS, was involved – the case merits little attention here. First, the district court vacated its decision. *See American Public Communications Council, Inc. v. Allnet Comm. Svcs., Inc.,* 959 F. Supp. 19 (D.D.C. 1997). Second, contrary to Plaintiffs' contention, it does not appear that the Court addressed the issue of APCC, Inc.'s

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[4] By contrast, APCCS's parent company, the American Public Communications Council, Inc. ("APCC Inc."), which Plaintiffs have taken great pains in the discovery process to point out is *not* a party to this action, is incorporated as a non-profit corporation for the purpose of "establish[ing] an organization to effectively represent the interests of the public communications industry." *See* Articles of Incorporation American Public Communications Council, Inc., attached hereto at Ex. B. APCC, Inc. – not the Plaintiffs here – is the organization that represents the PSPs' interests before the FCC and has acted as their mouthpiece in administrative matters before the FCC, where of course there is no requirement of Article III standing.

standing as an aggregator. Pl. Opp. at 13. Instead, the defendant challenged whether APCC, Inc.'s members themselves were entities to whom the FCC order at issue required compensation (*i.e.*, whether the PSP members themselves had standing, which is the first prong of the *Hunt* associational standing test). The Court found that APCC, Inc. had produced evidence that the PSPs were subject to the order, and therefore had standing. 1993 WL 544300, at *1 (quoted in Pl. Opp. at 14). Finally, there is so little discussion in the opinion on the issue of standing, that the Court's actual holding and the reason for its holding is not entirely clear. In short, *APCC, Inc. v. Allnet* is worthless as precedent for this case.

B. Both the Claim and the Relief Requested Require Participation of Individual PSPs

This action is clearly one in which "the claim asserted [or] the relief requested requires the participation of the individual members." *Hunt,* 432 U.S. at 343. In its opposition, Plaintiffs raise contradictory and nonsensical arguments to refute AT&T's contention that the absence of the individual PSPs as parties creates procedural problems and unfairness to AT&T. For example, Plaintiffs argue that the assignments provide for finality and assure AT&T that the individual PSPs are bound to any settlement or judgment. *See* Opening Brief at 8-9 *and compare* Pl.

Opp. at 14-18. Yet, five pages later in their brief, Plaintiffs also argue that because AT&T is not a party to the Assignments, AT&T may not invoke their terms against the Plaintiffs or the PSPs. Pl. Opp. at 23.

Assuming Plaintiffs are correct and AT&T may not assert against the PSPs the terms of an Assignment to which AT&T is not a party, then Plaintiffs have not addressed the fact that the participation of the individual PSPs is necessary to a complete and fair resolution of this dispute. The problems AT&T raised in its Opening Brief at 8-9 remain. Specifically, the issue of whether a PSP will remain involved in this case is between the *PSP* and *Plaintiffs* under the terms of the Assignments. Pl. Opp. at 14-15, 16-17. Because the PSPs are not parties, the Court has no direct control over them and AT&T cannot keep them in the case or bind them to the Court's rulings. For example, if a PSP is not satisfied with the Court's ruling on a motion for summary judgment, what prevents it from dropping out of this litigation and suing AT&T on its own? According to Plaintiffs' agreements with the PSPs, all the PSP needs to do to drop out of the litigation is to stop paying legal fees. (*See, e.g.*, Opening Brief Ex. C, at 3).

Even if AT&T were able to assert the terms of the Assignments against the PSPs in subsequent litigation, AT&T would be compelled to litigate all of the PSPs' defenses to those contracts before assuring

finality to this litigation, including arguments that they lack consideration and are not enforceable under Virginia law. *See* Opening Brief at 9-10.

It is not really necessary for the Court to resolve the issues of whether AT&T has standing here to challenge the validity of the Assignments or whether the Assignments are valid under Virginia law. However, contrary to Plaintiffs' contention, it is not entirely clear that these claims are assignable under Federal law since the Telecommunications Act grants a cause of action to the "persons injured." 47 U.S.C. § 206. While there is no case addressing assignability of claims under § 206, under similar circumstances the Sixth Circuit has held that the statutory language used forcloses the possibility of assignment. *See Quarles v. The City of East Cleveland,* 1999 WL 1336112, at *3 (6th Cir. 1999) (unpublished opinion holding that under statutory language in the Communications Policy Act which grants a cause of action to the "injured party" the claims are not assignable) (attached at Ex. C). But even if the rights granted are assignable under Federal law, the validity of the Assignment itself is governed by state law. *Martin v. Morgan Drive Away, Inc.,* 665 F.2d 598, 604 (5th Cir. 1982) (applying state law even though antitrust claim was assignable as a matter of federal law where the issue was not with the substance of assignable claim but with the form in which the claim could be assigned); *Nicolls Pointing Coulson, Ltd. v. Transportation Underwriters of La., Inc.,* 777 F. Supp. 493, 496

(E.D. La. 1991). Moreover, Virginia law would govern the APCC Assignments because they are incorporated into an amendment to the original service contract that is governed by Virginia law. *See* Opening Brief, Ex. F, APCCS Services Agency Compensation Agreement at ¶ (8)(g) *and* Pl. Opp., Ex. I, Amendment to APCCS Services Agreement at 3. *See also Duncan v. G.E.W., Inc.,* 526 A.2d 1358, 1363 n.6 (D.C. 1987) (applying choice of law clause in parent contract to options incorporated into parent agreement). In any event, under the most significant relationship test followed in the District of Columbia, Virginia law would apply since services are performed by APCCS in Virginia, payments are made to APCCS in Virginia and distributed to the PSPs are made from Virginia and the contract has a Virginia choice of law provision. Finally, while the statements in *American Title Ins. Co. v. Burke & Herbert Bank & Trust Co.,* 813 F. Supp. 423, 429 n.7 (E.D. Va. 1993) may be dicta, they were made after the court rejected the proposition in case law from other states that statutory claims were assignable and found that not to be the law in Virginia. Since the decision is the only pronouncement on this issue of Virginia law, it is entitled to some deference. Thus, the PSPs have a substantial basis to challenge the validity of the Assignments and, therefore, there is no end in sight to this litigation for AT&T.

Moreover, AT&T's counterclaims seek to offset amounts owed by individual PSPs to AT&T against

any damages claimed here on behalf of those PSPs. To the extent the counterclaim damages exceed any recovery by Plaintiffs, from whom is AT&T to collect its damages? The assignments do not purport to expose Plaintiffs to liability. Nor do they provide Plaintiffs with funds from which to pay counterclaim damages. *See* Opening Brief at 9.[5] Accordingly, the individual PSPs are necessary to a full and final resolution of this dispute.[6]

Finally, individual proof of PSPs' damages is necessary here. This is not a situation like *Brown Group* where damages can be distilled to a simplified mathematical formula. Instead, as set forth below,

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[5] Plaintiffs' contention that AT&T in the normal course of business initiates offsets through the aggregators is irrelevant. Pl. Opp. at 17-18. AT&T does not seek recovery of the offset money from the aggregator; it identifies specific amounts owed by each PSP and looks to the aggregator only to collect it from the PSP.

[6] Plaintiffs argue that in lieu of dismissal, the Court should permit Plaintiffs to amend the complaint to add each of the PSPs as parties. Pl. Opp. at 28, fn. 4. This is not an option available to the Court. If Plaintiffs have no standing, the Court has no jurisdiction over the subject matter and therefore no jurisdiction to allow the amendment.

Moreover, as the Supreme Court has made clear, the federal rules of joinder may not be used to create jurisdiction that did not exist when the complaint was filed. *Lujan,* 504 U.S. at 571. *See also* Fed.R.Civ. P. 82 (the federal rules may not be used or interpreted to expand the jurisdiction of the courts).

the facts related to damages require individualized proof. Thus, this action is entirely inappropriate for the application of associational standing.

C. *Brown Group* Is Irrelevant Here

Plaintiffs misstate the Supreme Court's holding in *Brown Group*. *Brown Group* did not undercut the decision in *Telecommunications Research & Action Center v. Allnet Comm. Svcs., Inc.*, 806 F.2d 1093, 1098 (D.C. Cir. 1986) that an association ordinarily cannot sue for monetary damages to members. Pl. Opp. at 19.[7] Instead, what *Brown Group* addressed was whether "in enacting the WARN Act, Congress intended to abrogate the otherwise applicable standing limitation so as to permit the union to sue for damages to its workers, and if it did, whether it had the constitutional authority to do so." *Brown Group*, 517 U.S. at 546. The Court held that the third prong of *Hunt* was prudential rather than constitutional in nature. As such, Congress could, *by statute*, permit

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[7] Several district courts have followed this principle after *Brown Group*. *See, e.g., The Legal Aid Society v. City of New York*, 114 F. Supp.2d 204, 213-14 (S.D.N.Y. 2000) ("to accept the Union's argument would effectively terminate the third prong of the associational standing test."); *Dallas Police Assoc. v. City of Dallas*, 1999 WL 604850, at *2 (N.D. Tex. 1999) (citing *Brown Group*) (attached at Ex. D); *Chicago Journeymen Plumbers' Local Union 130, U.A. v. Personnel Board*, 154 L.R.R.M. (BNA) 2915, 1996 WL 288631, at *2 (N.D. Ill. 1996) (attached at Ex. E).

the union to sue for damages on its members' behalf. *Id.* at 555. The Court expressly *declined* to decide whether a simplified claim for damages could be brought by an association on behalf of its members absent such a federal statute. *Id.* at 554 n.5 ("we need not decide here whether, absent congressional action, the third prong [of *Hunt*] would bar a 'simplified' claim for damages.") *Brown Group* stands only for the proposition that Congress may grant an express right to sue for damages to persons who would otherwise be barred by purely prudential standing rules. Since there is no such statute at issue here, the *Brown Group* decision is irrelevant.

The controlling case on associational standing in this Circuit is *Telecommunications Research,* 806 F.2d 1093. In that case, the D.C. Circuit considered whether, in the *absence* of a statute granting it standing, an association may sue for money damages on behalf of its members. While the D.C. Circuit did not recite a *per se* rule prohibiting such damages actions, it held that where individualized participation and proof was required from the members, the claim could not be brought by the association. *Id.* at 1095.

Under the reasoning of *Telecommunications Research,* Plaintiffs' argument that they can effectively represent the interests of the individual PSPs should be evaluated under the same type of factors used in analyzing whether to certify a class action under Rule 23(b)(3). *See Telecommunications*

Research, 806 F.2d at 1096. For the same reasons the PSPs would be unable to gain class certification under Fed. R. Civ. P. 23, particularly the predominance of individual issues, Plaintiffs here should not be allowed to "circumvent Rule 23(b)(3) in the manner proposed." *Telecommunications Research,* 806 F.2d at 1096.

Here, the amount of and liability for any dial-around compensation owed to each PSP will depend on numerous factors specific to each individual PSP, including, *inter alia,* (1) the number of payphone lines, or "ANIs," in service; (2) the dates each of the PSP's ANIs were in service; (3) the Local Exchange Carrier ("LEC") providing connectivity to each of the PSP's ANIs and the activity of the LEC's switches; (4) the date each ANI operated by the PSP began sending payphone-specific Flex ANI digits to AT&T, permitting per-call tracking of payphone calls; (5) the service history of the LEC switch to which the ANI was connected; (6) the number of calls carried by AT&T and answered by third parties on each ANI; and (7) the number of calls for which AT&T has compensated the PSP and the amount paid. In short, each of the more than 1400 PSPs must make an individualized case for liability and damages against AT&T, and AT&T has a corresponding case for over-compensation against each PSP. Thus, the very concerns first voiced by the Supreme Court in *Warth,* which were later set out as the third *Hunt* factor, are precisely the reason why Plaintiffs here cannot be

allowed to claim associational standing on behalf of the PSPs. *Warth*, 422 U.S. at 515-16 (associational standing must be denied where injury alleged is "peculiar to the individual member concerned, and both the fact and extent of inquiry would require individualized proof.")

Respectfully submitted,

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ATTORNEYS FOR AT&T CORPORATION

Dated: March 14, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., *et al.*,	)	
Plaintiffs,	)	**Civil Action No. 99-0696 (ESH)**
AT&T CORPORATION,	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed Mar. 28, 2003)

Plaintiffs have brought suit under section 206 of the Telecommunications Act of 1996, 47 U.S.C. § 206, which requires Interexchange Carriers ("IXCs") such as defendant AT&T to pay "dial-around" compensation to payphone service providers ("PSPs") for certain long distance calls originating from their payphones. Plaintiffs seek payment of dial-around compensation that they allege defendant owes the PSPs they represent. Defendant filed this motion to dismiss for lack of subject matter jurisdiction challenging plaintiffs' standing to bring suit. Defendant argues that as assignees of the PSPs, plaintiffs have suffered no injury-in-fact of their own and have no personal stake in the outcome of the litigation. Defendant also argues that even if plaintiffs have standing, the assignments are not valid under the applicable state law. Plaintiffs claim that they have standing based on the assignments, or in the alternative, they have associational standing. Despite the

fact that defendant failed to raise this jurisdictional defect during the four years that this case has been pending, the Court must agree that plaintiffs lack standing based on the assignments executed by the PSPs, and they cannot satisfy the requirements of associational standing. Therefore, defendant's motion to dismiss will be granted.

BACKGROUND

Plaintiffs APCC Services Inc.,[1] Data Net Systems, LLC, Jaroth, Inc. d/b/a Pacific Telemanagement Services, NSC Telemanagement Corp., Davel Communications Group, Inc., and Peoples Telephone Company, Inc. filed this action on behalf of more than one thousand PSPs that own and operate over 400,000 public payphones throughout the United States.[2] (First Amended Complaint ["Am. Compl."] ¶ 1.) Five of the six plaintiffs are "aggregators," or

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[1] Plaintiff APCC Services's parent company, the American Public Communications Council, Inc., is a non-profit corporation established to "effectively represent the interest of the public communications industry." (Def.'s Reply Ex. B.) It is the organization that represents the PSPs' interests in administrative matters before the FCC. (Def.'s Reply at 7 n.4.) However, APPC Services, Inc. is a for-profit company.

[2] PSPs own, install, operate, manage, or maintain payphone services and facilities which enable callers to access the telephone network when away from their home or office. They recover the cost of the payphone services and facilities by receiving payment for their use from callers or from carriers. (Am. Compl. ¶ 14.)

clearinghouses, created to streamline the billing and collection of dial-around compensation from IXCs.[3] Defendant is a common carrier of telephone calls and is subject to the compensation payment obligations mandated by section 276 of the Communication Act of 1934, as amended, 47 U.S.C. § 276. (*Id.* ¶ 10.)

Pursuant to section 276, defendant is required to compensate PSPs for completed access code and toll free calls that are made using PSPs' payphones and carried over defendant's telephone network facilities. (*Id.* ¶ 1.) PSPs contract with aggregators to facilitate the billing and payment process. Thus, in return for a fee from the PSPs, plaintiffs provide billing information to defendant's collection agent – the National Payphone Clearinghouse (NPC), collect payment from the NPC, and distribute the dial-around compensation to the PSPs they represent. (Pls.' Mem. at 5).

Plaintiffs bring this suit as assignees of the claims of the PSPs they represent. The assignments provide that each PSP "assigns, transfers and sets over to [plaintiff] for purposes of collection all rights, title and interest of the [PSP] in the [PSP's] claims, demands or causes of action for 'Dial-Around

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[3] This motion is directed only to the aggregator plaintiffs and not plaintiff Peoples Telephone Company, which is the only plaintiff in this case that brings this action on its own behalf. Consequently, for the purposes of this Memorandum Opinion, the term "plaintiffs" excludes Peoples Telephone Company.

Compensation.'" (Def.'s Mem. Ex. A at 1.)[4] Each assignment also appoints plaintiffs as attorney-in-fact with the power to do all acts necessary to collect dial-around compensation, including the power to retain counsel, file lawsuits, and enter into settlements. (*Id.*) In addition, assignors agree to be bound by any final determinations in court or regulatory proceedings prosecuted by plaintiffs on the PSPs' behalf. (*Id.*) The assignments do not provide plaintiffs the right to retain or share in any proceeds of the litigation. (*Id.*)

Defendant argues that since plaintiffs sue as assignees who have not suffered any injury-in-fact of their own and have no personal stake in the outcome of the litigation, they do not have standing to sue and their claims should be dismissed for lack of subject matter jurisdiction. Alternatively, they argue that the assignments to plaintiff APCC Services are not valid under the applicable state law so that even if this plaintiff has standing, its claims should be dismissed. Since the Court concludes that none of the plaintiffs has standing to sue as assignees or as representatives of the PSPs, it need not address the validity of plaintiff APCC Service's assignments.

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[4] During discovery, plaintiffs produced nearly 1,300 identical assignments from the PSPs they represent. (Def.'s Mem. at 2 n.2.)

LEGAL ANALYSIS

I. Legal Standard

Defendant's motion to dismiss for lack of standing is a challenge to the Court's subject matter jurisdiction brought pursuant to Fed. R. Civ. P. 12(b)(1). "For purposes of ruling on a motion to dismiss for want of standing . . . courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The burden is on plaintiffs to establish the elements of standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

Questions regarding both constitutional and prudential requirements for standing are at issue here. Constitutional standing requirements are drawn from Article III and require plaintiffs to demonstrate "(1) a concrete and particularized actual or imminent injury (2) that is fairly traceable to Defendant's conduct (3) which a favorable court decision will redress." *Id.* at 560. "These requirements together constitute the 'irreducible constitutional minimum' of standing, which is an 'essential and unchanging part' of Article III's case or controversy requirement." *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 771 (2000) (quoting *Lujan,* 504 U.S. at 560).

The injury-in-fact requirement for standing is met only if the party bringing the action suffers an injury as a direct result of the challenged conduct.

Lujan, 504 U.S. at 563. Plaintiffs must also demonstrate that they have a concrete private interest in outcome of the suit. *Id.* at 573. The concrete interest must be related to the injury-in-fact and consist of obtaining compensation for, or preventing, the violation of a legally protected right. *Vermont Agency,* 529 U.S. at 776.

The prudential requirements for standing are judicially imposed limits on the exercise of federal jurisdiction. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 551 (1996). These include the "general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiffs complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright,* 468 U.S. 737, 751 (1984). Federal courts have adopted prudential limits on standing in order "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 804 (1985).

II. Plaintiffs' Standing as Assignees

Plaintiffs are assignees of the PSPs that claim that defendant owes them dial-around compensation, and they argue that they have standing based on

these assignments. Their position is that an assignment from an injured party satisfies the constitutional standing requirement of a concrete injury traceable to defendant's conduct. Defendant challenges plaintiffs' standing relying on a recent Second Circuit case which held that where an assignment does not convey a concrete stake in the outcome of the litigation, the assignee does not "suffer an injury of a nature that would confer standing upon it under Article III of the Constitution." *Connecticut v. Physicians Health Services of Conn.*, 287 F.3d 110, 115 (2d Cir. 2002) [hereinafter "*Physicians Health*"].

The Second Circuit's analysis in *Physicians Health* is persuasive and that case is indistinguishable from the instant one. In *Physicians Health,* the State of Connecticut brought suit under ERISA against an insurance company offering managed care plans to Connecticut residents. *Id.* at 112. The State asserted standing to sue as the assignee of participants in the managed care plans who had been injured by the plans' actions and who had assigned their right to seek injunctive or other equitable relief to the State. *Id.* at 113. The assignments did not, however, include the right to sue for money damages. *Id.* The Court explained that "[t]ypically, the assignee, obtaining the assignment in exchange for some consideration running from it to the assignor, replaces the assignor with respect to the claim or the portion of the claim assigned, and thus stands in the assignor's stead with respect to both injury and remedy." *Id.* at 117. In *Physicians Health,* there was

no such exchange, and the assignments "d[id] not shift the loss suffered by individual enrollees from the alleged breach . . . from the individuals to the State." *Id.* at 116. As a result, the Court concluded that the assignment did not confer standing on the State.

Plaintiffs' situation is precisely the same as that of the State of Connecticut. The assignments on which plaintiffs rely for standing do not shift the loss suffered by the PSPs to the aggregators that represent them. Nor did plaintiffs obtain their assignments in exchange for consideration to the PSPs. And while the Second Circuit recognized that there are some situations where the assignment of a claim may confer standing on an assignee who has not incurred an injury, expense or loss in exchange for the assignment, *id.*, the Court made clear that a such a "'claim' cannot simply refer to a right to bring suit." *Id.* 118 n.8. Since plaintiffs' assignments in this case grant only the right to sue and not a right to a remedy, plaintiffs have failed to establish standing.

In response, plaintiffs argue that they have a stake in the outcome of this litigation, even though they are not entitled to damages, because their compensation for billing and collection activities is based upon the number of payphones and telephone lines their PSPs have active in any billing quarter, and to the extent that the PSPs and the payphone industry are not profitable due to systematic undercompensation by defendant, plaintiffs' compensation is diminished and its business is threatened. (Pls.' Opp. at 7.) But the Supreme Court has made clear

that the interest required to create standing must "consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Vermont Agency,* 529 U.S. at 772. "[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773. Consequently, since plaintiffs' interest is "merely a byproduct" of the suit and not an interest in compensation for a violation of a legally protected right, their interest is too attenuated to give rise to a cognizable injury in fact under Article III.[5]

Plaintiffs also suggest that *Physicians Health* is inapposite because its holding is based on ERISA's limitations as to the classes of people who may file civil enforcement actions. (Pls.' Opp. at 11.) While the civil enforcement provisions of ERISA were the basis for the district court's holding, the Second Circuit did not rely on the lower court's reasoning. 287 F.3d at 115 ("We reach the same conclusion as that of the district court, that the State lacks standing to pursue this action as an assignee of the eight plan participants' right to bring an action in equity, although our reasoning differs from the district court's."). Thus,

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[5] Plaintiffs' reliance on the practice of the FCC and defendant of using aggregators to assist in the collection of dial-around compensation to bolster a claim of standing is likewise unavailing. (*See* Pls.' Opp. at 2-8.) The business practices of the various players in a regulatory scheme do not confer Article III standing on plaintiffs nor do they serve to give the Court subject matter jurisdiction over this case.

plaintiffs cannot distinguish their case from the plaintiff's situation in *Physicians Health.*

Nor can plaintiffs rely on *Vermont Agency* to save their claim. *Vermont Agency* involved a challenge to the standing of a citizen to sue on behalf of the United States government in a *qui tam* action brought under the False Claims Act ("FCA"). The FCA allows a private person to bring a civil action "for the person and for the United States Government . . . in the name of the Government," 31 U.S.C. § 3730(b)(1), against anyone who, *inter alia,* presents "a false or fraudulent claim for payment" to the government. § 3729(a). The statute also provides plaintiffs with a right to a portion of any damages recovered on behalf of the government. § 3730(d)(1).

The Supreme Court concluded that plaintiff had standing to bring suit on behalf of the government under the FCA even though he did not have a concrete private interest in the outcome of the suit that was related to the injury-in-fact. The Court found that "the United States' injury-in-fact suffice[d] to confer standing" on the plaintiff because the "FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Vermont Agency,* 529 U.S. at 773. Notably, assignments effected by the FCA include both the right to sue and the right to the remedy – thus, assigning an interest in the suit directly related to the assignor's original injury. The Court's analysis also relied heavily on "the long tradition of *qui tam* actions in England and the American Colonies." *Id.* at 774.

Plaintiffs read *Vermont Agency* too broadly. While the Supreme Court held that an "assignee of a claim has standing," *id.* at 773, the case does not stand for the proposition that all assignments confer standing. Such a reading would clearly violate the constitutional requirements for standing articulated in *Lujan.* The Supreme Court found that the plaintiff in *Vermont Agency* had standing to bring suit based on three factors: (1) a statutory assignment of (2) both the right to sue and the right to a remedy, and (3) historical support for the action. None of these factors is present in this case, and thus, this case is distinguishable from *Vermont Agency.*

First, unlike a *qui tam* relator, plaintiffs in this case were not assigned claims pursuant to a grant of statutory authority. Second, plaintiffs do not have a concrete private interest in the outcome of this suit that is directly related to the injury that serves as the basis for the suit. Moreover, the outcome of the suit will not affect plaintiffs "in a personal and individual way," *Lujan,* 504 U.S. at 560 n.1, since, unlike a typical assignment, none of the remedies sought will flow to plaintiffs as assignees. *See, e.g., Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.,* 339 U.S. 827 (1950) (assignee of licensor has standing to sue licensee for royalty payments due under license agreement and to retain payments recovered); *Hubbard v. Tod,* 171 U.S. 474 (1898) (general assignee has standing to sue in the name of debtor/assignor pursuant to Iowa statute); *I.V. Services of American v. Trustees of American Consulting Engineers Council*

Insurance Trust Fund, 136 F.3d 114, 117 (2d Cir. 1998) (standing where assignment included right to insurance benefits); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.,* 985 F.2d 1148, 1153-54 (2d Cir.1993) (granting standing to *qui tam* plaintiff); *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp,* 995 F.2d 425, 437 (3d Cir. 1993).[6] Finally, there is no historical support for granting standing by assignment in this case.

Plaintiffs' reliance on *American Public Communications Council, Inc. v. Allnet Communication Services, Inc.,* 1993 WL 544300, at *1 (D.D.C. 1993), *vacated on other grounds,* 959 F. Supp. 19 (D.D.C. 1997), is also misplaced. Plaintiffs suggest that this Court "summarily rejected" an argument "identical" to that currently raised by defendant when, in fact, *Allnet* never addressed the issue of plaintiff's standing as an assignee. As here, the plaintiff in *Allnet*

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[6] Plaintiffs also rely on *Paoloni v. Goldstein,* 200 F.R.D. 644 (D. Col. 2001), where the court granted standing to brokers to sue as assignees of clients who had been defrauded even though the brokers had not suffered a direct injury. While it is not clear whether the assignments included the right to retain a portion of any damages recovered, that case relies on *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western R.R. Co.,* which clearly did. 539 F.2d 1107, 1110 (7th Cir. 1976) ("Prior to the filing of this action, plaintiff paid . . . the owner . . . $60,808.64 in full settlement of all claims and in return [the owner] assigned all claims it possessed for the los sustained."). However, to the extent that the assignments in *Paoloni* did not involve the right to retain a portion of the damages, it is unconvincing and reflects a misreading of *Vermont Agency.*

sued to recover dial-around compensation that defendant Allnet allegedly owed plaintiff's member PSPs. Defendant challenged plaintiff's standing to sue arguing that plaintiff's members were not entitled to dial-around compensation. *Id.*, at *1. If that were the case, the PSPs would not have had standing to assert a claim that could be assigned. Here, there is no question that the PSPs have a basis for a claim. Rather, the question is whether plaintiffs have standing to assert the PSPs' claims as assignees. That issue was simply not addressed in *Allnet*.

In short, plaintiffs, like the State of Connecticut, "do[ ] not, through th[e] assignment[s], possess the requisite interest that is or is threatened to be injured by [defendant's] conduct." 287 F.3d at 119. Consequently, they do not have standing as assignees to bring suit for damages on behalf of the PSPs.

III. Associational Standing

Plaintiffs also argue that they would have standing, even if there were no assignments, based on the doctrine of associational standing recognized in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). (Pls.' Opp. at 18-21)[7] The Supreme

[7] Plaintiffs refer to this doctrine as "representational standing" (Pls.' Opp. at 18), but as is clear from *Hunt*, it is more appropriately referred to as "associational standing." 432 U.S. at 343.

Court has articulated the requirements for associational standing as follows:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343.

The first two *Hunt* conditions are satisfied in this case. First, there is no question that the PSPs that plaintiffs represent have standing to challenge defendant's alleged underpayment of dial-around compensation. Second, plaintiffs' sole purpose is to collect the dial-around compensation owed to the PSPs they represent – the same interest they seek to protect through this litigation. *Id.* at 343-44. Plaintiffs cannot, however, satisfy the third prong of *Hunt,* for the money damages plaintiffs seek to collect are the kind that ordinarily require individual participation.[8]

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[8] Since APCC Services, Inc. is not a trade association or "an organization of members who pay dues," but is a for-profit corporation that charges a fee for rendering services, defendant argues that they cannot have associational standing under *Hunt*. (*See* Def.'s Reply at 6-7.) In *Hunt,* the Supreme Court found that a state commission, which was not a "traditional voluntary membership organization," had associational standing to assert the claims of its members because it possessed "all of

(Continued on following page)

This result is clearly mandated by D.C. Circuit precedent. First, in *Telecommunications Research & Action Center v. Allnet Communication Servs., Inc.*, 806 F.2d 1093 (D.C. Cir. 1986) [hereinafter "TRAC"], the Circuit held that "the money damage claims TRAC seeks to advance are the kind that ordinarily require individual participation, so that TRAC may not proceed in the format it has selected." *Id.* at 1095. In *TRAC,* a non-profit association concerned with promoting fair, reasonable, and non-discriminatory rates for communications services, sued to recover money damages from a utility that allegedly overcharged its members. *Id.* at 1093-94. The Court rejected plaintiff's argument that individualized proof of damages by its members would not be required because damages could be calculated by a simple formula and concluded that plaintiff did not have standing to sue for money damages on behalf of its members. *Id.* at 1095.

Subsequently, in *Air Transp. Ass'n v. Reno,* 80 F.3d 477 (D.C. Cir. 1996), the Court held that an association lacked standing to seek an order requiring a government agency to reimburse its members for expenses they incurred where individualized proof was necessary and the members were not

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the indicia" of a membership organization. 432 U.S. at 342-44. Since this Court concludes that plaintiffs fail to meet the requirements for associational standing, it need not determine whether plaintiffs are the equivalent of an association for standing purposes.

participating in the lawsuit. *Id.* at 483. Relying on *TRAC,* the Court refused to grant associational standing where detailed and individualized proof from each airline would be needed. Thus, while the Court "acknowledge[d] that a request for monetary relief by an association does not *absolutely* preclude standing in all cases, the question in each case is whether the monetary relief can be awarded without 'individualized proof.'" *Id.* at 484 (emphasis in original).

As in these Circuit cases, the damage claims of the PSPs "are not common to the entire membership, nor shared by all in equal decree," and therefore, "individualized proof" will be necessary. *Warth v. Seldin,* 422 U.S. 490, 515-16 (1975). Given the undisputed need for individualized proof, it is of no significance that plaintiffs have the necessary records or that it would foster "administrative convenience and administrative efficiency" if plaintiff aggregators were permitted to pursue claims on behalf of the PSPs. (Pls.' Opp. at 21.) A similar argument was considered and rejected by the Court in *TRAC*:

> We think we are not at liberty to break new ground in this case, and believe that the Supreme Court's reference to the need for "individualized participation" in *Hunt* implied something more than individual in-court testimony to establish the fact and extent of injury.

806 F.2d at 1095. *See also infra* note 9.

Confronted by this binding precedent, plaintiffs attempt to salvage their claims by relying on *United Food & Comm. Workers Union Local 451 v. Brown Group, Inc.*, 517 U.S. 544 (1996) [hereinafter "*Brown Group*"]. (*See* Pls.' Opp. at 19-20.) Plaintiffs' reliance is, however, misplaced. In *Brown Group,* the Supreme Court addressed the prudential nature of *Hunt's* third prong as it applied to a federal statute. It reaffirmed *Hunt's* "suggest[ion] that an association's action for damages running solely to its members would be barred for want of the association's standing to sue" remained the law, *id.* at 546, but determined that "in enacting the WARN Act, Congress intended to abrogate this otherwise applicable standing limitation so as to permit the union to sue for damages running to its workers, and . . . had the constitutional authority to do so." *Id* at 546.[9] Thus, *Brown Group* was limited to the proposition that Congress may grant an express right to sue for damages to persons who would otherwise be barred by purely prudential standing requirements.

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[9] In addition, *Brown Group* rejected plaintiff's invitation to hold that the third prong of *Hunt* could be satisfied by a "simplified" claim for monetary relief. *Id.* at 545 n.5. Rather, the Court stated:

> In light of our conclusion that in the WARN Act Congress has abrogated the third prong of the associational standing test, we need not decide here whether, absent congressional action, the third prong would bar a "simplified" claim for damages.

Id. at 554.

Obviously, there is no statute here that grants associational standing to plaintiffs nor is there any legal basis for extending *Brown Group* to cover the instant case. On the contrary, case law subsequent to *Brown Group* continues to reaffirm the D.C. Circuit's holdings in *TRAC* and *Air Transport*. *See, e.g., Pa. Psychiatric Society v. Green Spring Health Servs., Inc.*, 280 F.3d 278 (3d Cir. 2002) (associational standing is improper for claims requiring a fact-intensive-individual inquiry); *The Legal Aid Society v. City of New York*, 114 F. Supp.2d 204, 213-14 (S.D.N.Y. 2000); *Dallas Police Ass'n. v. City of Dallas*, 1999 WL 604850, at *2 (N.D. Tex. 1999); *Chicago Journeymen Plumbs' Local Union 130, U.A. v. Personnel Bd.*, 154 L.R.R.M. (BNA) 2915, 1996 WL 288631, at *2 (N.D. Ill. 1996). The decisions in *TRAC* and *Air Transport* govern this case,[10] and while it may be that the Circuit has not adopted a *per se* rule barring associational standing in all claims for money damages, *TRAC*, 806 F.2d at 1095, these cases clearly preclude a finding of associational standing here.

CONCLUSION

Since plaintiffs lack standing, the Court has no subject matter jurisdiction and their claims must be

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[10] Significantly, the Court in *Air Transport* denied rehearing and suggestion for rehearing in banc on May 24, 1996, which was several weeks after *Brown Group* was decided.

dismissed.[11] As a result, the complaint of the plaintiffs/assignees[12] is dismissed with prejudice. A separate Order accompanies this Memorandum Opinion.

/s/ Ellen S. Huvelle
ELLEN SEGAL HUVELLE
United States District Judge

Dated: 3/28/03

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[11] Plaintiffs appear to suggest that they should be permitted to amend their complaint. (Pls.' Opp. at 28 n.4.) This is not an available option. *See, e.g., Lans v. Gateway 2000, Inc.*, 84 F. Supp.2d 112, 115 (D.D.C. 1999).

[12] These plaintiffs include APCC Services Inc., Data Net Systems, LLC, Jaroth, Inc. d/b/a Pacific Management Services, NSC Telemanagement Corp., and Davel Communications Group, Inc., but not the one individual PSP – Peoples Telephone Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., *et al.*, Plaintiffs, v. SPRINT COMMUNICATIONS COMPANY, L.P., Defendant.	Civil Action No. 1:01 CV 642 (ESH)

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT

May 22, 2003

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., *et al.*, Plaintiffs, v. SPRINT COMMUNICATIONS COMPANY, L.P., Defendant.	Civil Action No. 1:01 CV 642 (ESH)

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiffs APCC Services, Inc. ("APCCS"), Data Net Systems, LLC ("Data Net"), Jaroth, Inc. ("Jaroth"), NSC Telemanagement Corporation ("NSC") and Davel Communications Group, Inc. ("Davel") (collectively, "the plaintiff aggregators" or "plaintiffs") herein submit this Memorandum in support of their Motion for Leave to Amend Complaint ("Motion") pursuant to Rule 15 of the Federal Rules of Civil Procedure, in order to set forth additional grounds for relief under the Communications Act of 1934, as amended ("the Communications Act," or "the Act").

The additional grounds for relief arise out of the same alleged misconduct of defendant that is set forth in the Complaint, so that no difference in proof will be required. Plaintiffs' proposed First Amended Complaint is set forth at Exhibit A to their Motion.

Plaintiffs also submit this Memorandum in support of their alternative and conditional motion for leave to amend their Complaint pursuant to Rules 15 and 17(a) of the Federal Rules of Civil Procedure. This First Amended Complaint, in addition to setting forth the foregoing additional grounds for relief under the Communications Act, seeks to join the payphone service providers ("PSPs") on whose behalf plaintiffs sue in the event this Court adheres to its decision in *APCC Services, Inc. v. AT&T Corp.*, No. 1:99CV00696, 2003 WL 1633523 (D.D.C. March 28, 2003) (hereinafter, "*AT&T*"), that the named plaintiff aggregators do not have standing to sue for injuries to the PSPs.[1] The PSPs on whose behalf plaintiffs sue are listed in Exhibits A through E of the Complaint. Plaintiffs respectfully submit that this Court's decision in *AT&T* was misguided and should not be followed here. For the reasons set forth below, the named plaintiffs do have standing, and the PSPs' ratification of the commencement of this action by the named plaintiffs is legally sufficient in any event. Nonetheless, in the event the Court adheres to its decision in

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[1] A proposed First Amended Complaint joining the PSPs is set forth in Exhibit B to Plaintiffs' Motion for Leave to Amend Complaint.

AT&T but allows a curative amendment, plaintiffs request 30 days from the date of entry of its Order in order to obtain consents to joinder from all such PSPs. To date, plaintiffs have received in excess of 800. *See* Ex. C to Motion (Declaration of Robert N. Felgar ("Felgar Decl."), ¶ 3.

I. FACTUAL BACKGROUND

A. The Complaint

This suit was brought by plaintiffs, known in the telecommunications industry as "aggregators," against defendant, a common carrier of telephone calls, on behalf of hundreds of independent (*i.e.*, non-telephone company) PSPs, that own and operate over 400,000 public payphones located throughout the United States. The PSPs recover the cost of their payphone services and facilities by receiving payment for the use of the payphones either from callers, who deposit coins into the payphones in order to place a call, or from carriers. Complaint ("Compl."), ¶ 14. Section 276 of the Act requires the FCC to ensure that PSPs are "fairly compensated for each and every completed intrastate and interstate call using their payphone. . . ." 47 U.S.C. § 276(b)(1)(A). For local calls and other calls where the end-user caller deposits coins into the payphone to pay for the call, the PSP is directly compensated by the end user. For calls placed using the presubscribed carrier (generally calls dialed by dialing 0 plus the called number and thus referred to as "0+" calls), the FCC has determined that the

PSP receives fair compensation through its contractual arrangements with its carrier. However, for coinless calls where the caller uses a carrier other than the presubscribed carrier, the PSP is not compensated by either the end user or its presubscribed carrier. For these calls, known as "dial-around calls," and including access code calls and toll free calls, the FCC has adopted a "carrier-pays" system. Under this system, the carrier that carries the call, such as defendant, is required to pay the PSP 24 cents for the use of its payphone for each completed compensable call, thereby ensuring that the PSP is "fairly compensated." 47 C.F.R. § 64.1300(a) (2001); Compl., ¶¶ 19, 20.[2] Such compensation is known as "dial-around compensation."

The FCC requires each carrier to which a compensable call from a payphone is routed to track (or arrange for the tracking of) each such call to determine accurately the compensation it is required to pay to each PSP. 47 C.F.R. § 64.1310(a) (2001); Compl., ¶ 21. The FCC also requires each carrier, including defendant, and the PSPs, to establish arrangements for the billing and collection of compensation for such completed calls. *Id.*, ¶ 22.

As a result of the FCC's encouragement of efficient billing and payment procedures that minimize

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[2] Dial-around compensation thus is compensation paid by long distance companies, such as defendant, to PSPs, for access code calls and toll free calls made from payphones.

transaction costs and maximize the efficiency with which bills are sent and payment are made,[3] the PSPs created collections organizations, such as plaintiffs, that aggregate the compensation claims of PSPs. Similarly, the carriers created payment clearing-houses to interface with the PSP aggregators. For the past ten years, the vast majority of PSPs have dealt with carriers through aggregators such as plaintiffs, with the knowledge and consent of the carriers, including defendant.

Under long-standing contracts, aggregators like plaintiffs have powers of attorneys from their PSP customers that authorize them to deal with carriers like defendant to collect dial-around compensation. *See, e.g.,* Ex. A hereto. Aggregators like plaintiffs collect lists of payphone numbers owned by their PSP customers that they submit to the payment agents utilized by the carriers, including defendant. The carriers' payment agents, using call data supplied by the carriers, then determine how much the carriers owe each PSP, receive payment of those amounts from the carriers and transmit it to aggregators such

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[3] *See In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* Report and Order, 11 FCC Rcd. 20,541 (1996); *In the Matter of Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation,* Second Report and Order, 7 FCC Rcd 3251 (1992).

as plaintiffs, which, in turn, distribute the dial-around compensation to their PSP customers.[4]

The *raison d'etre* of aggregators such as plaintiffs is to secure full payment of dial-around compensation from the carriers, and the PSPs rely on the aggregators to do so. The zeal with which the aggregators pursue their billing and collection duties is a reflection of the financial stake they have in the business and profitability of their PSP customers, for their compensation is based on the number of payphones their PSP customers have active in any billing period.[5]

Each of the plaintiff aggregators here, pursuant to powers of attorney from the PSPs on whose behalf they act, has submitted quarterly statements to defendant for the payment of dial-around compensation, and each continues to do so as such compensation becomes due. The gravamen of plaintiffs' Complaint is that defendant has failed and refused to

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[4] The carriers' payment agents also send the aggregators a list of disputed payphone numbers, for example, where there is a question as to the identity of the owner or whether the payphone number was active in the billing period at issue. Aggregators such as plaintiffs then attempt to resolve such disputes on behalf of their PSP customers.

[5] The interests and involvement of the aggregators with their PSP clients are not limited to billing and collections, but extend into the policy arena as well. For example, plaintiff APCCS' parent, the leading independent PSP trade association, has actively participated before the FCC in every matter involving dial-around compensation over the last ten years.

pay millions of dollars in dial-around compensation it owes the PSPs under Section 276 of the Act, and the rules, regulations and orders of the Federal Communication Commission ("FCC") issued thereunder, for completed dial-around calls that have been made since October 1, 1998 on the PSPs' payphones through defendant's telephone network facilities.

B. The Assignments Of Claims

Following defendant's refusal amicably to resolve with the plaintiff aggregators the dispute over the amount of dial-around compensation it owes, certain of the PSPs on whose behalf the plaintiff aggregators were acting executed an Assignment and Power of Attorney ("assignment"). *See* Ex. B hereto.[6] Those assignments

> assign[ed], transfer[red] and set[ ] over to [the plaintiff aggregators] for purposes of collection all rights, title and interest of [the PSP] in [the PSP's] claims, demands or causes of action for "Dial-Around Compensation" ("DAC") due the [PSP] for periods since October 1, 1997, pursuant to Federal Communications Commission rules, regulations and orders. [*Id.*]

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[6] Not all PSPs represented by the plaintiff aggregators executed assignments. The ones that did are listed in Exhibits A through E of the Complaint. The assignments are virtually identical. To avoid burdening the record, only one of the assignments is set forth in Exhibit B hereto.

Under the assignments, the PSPs gave the plaintiff aggregators authority

- "[t]o do all acts necessary for the purpose of collecting DAC due [the PSP] for periods since October 1, 1997," and
- "[t]o [engage in] other activities on behalf of [the PSP] in connection with attempting to resolve such DAC claims, including, without limitation, selecting and retaining legal counsel, and filing and prosecuting court . . . proceedings in [the PSP's] interest." [*Id.*]

In the event the plaintiff aggregators brought suit to collect dial-around compensation, the PSPs under the assignments agreed

- "to be bound by final determinations in court,"
- "to be bound by any settlement, compromise or release reached by [the plaintiff aggregator] on [the PSP's] behalf," and
- to be bound by "any document executed in connection with any such settlement, compromise or release by [the plaintiff aggregator] on behalf of [the PSP]." [*Id.*][7]

[7] The assignments are not revocable without the written consent of the plaintiff aggregators, and any such revocation applies only to claims for compensation that accrue following revocation.

In addition, the PSPs executing assignments also executed amendments to the plaintiff aggregators' compensation agreements, in which they appointed the aggregators their exclusive agents for collection of the dial-around compensation in dispute, authorized the aggregators to select and retain legal counsel, to file and prosecute suits against the carriers refusing to pay, and to control the conduct of such litigation, including the right to enter into settlement agreements, and agreed to provide all documentation necessary to support their collection claims. *See* Ex. C hereto.[8] The aggregators, in turn, agreed to undertake collection actions, including collective legal action, to keep the PSPs informed of the progress of the litigation and collection efforts, and to remit recoveries to the PSPs. *Id.*

C. Ratifications And/Or Consents To Joinder

Following this Court's decision in *APCC Services, Inc. v. AT&T,* 2003 WL 1633523, the plaintiff aggregators obtained formal ratifications pursuant to F.R.C.P. 17(a) from more than 800 of the PSPs on whose behalf they sue, and more are flowing in. *See* Ex. C to Motion (Felgar Decl.), ¶¶ 3 & 5.[9] The PSPs in

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[8] The amendments to the compensation agreements are substantially identical. To avoid burdening the record, an example of such amendments is attached as Exhibit C hereto.

[9] As set forth in Section III.E, *infra,* plaintiffs maintain that the assignments, if deemed inadequate as assignments, are *de facto* ratifications. Nonetheless, they have sought formal

(Continued on following page)

these ratifications ratify the commencement of this suit by the plaintiff aggregators, authorize the plaintiff aggregators to continue to prosecute the suit in their own names, and confirm their agreement to be bound by any judgment entered in this action. The PSPs further confirm their agreement not to institute a separate action against defendant arising out of the facts pled in the amended complaints, and to execute any additional documents required by the Court to effectuate their intention to allow this action to proceed in the names of the plaintiff aggregators. *See id.*, ¶ 5. In executing these formal ratifications, the PSPs also have agreed to join as named plaintiffs in the event the Court determines it is necessary for them to do so for this action to proceed. *Id.*

II. AMENDMENT OF THE COMPLAINT SHOULD BE ALLOWED TO ADD ADDITIONAL GROUNDS FOR RELIEF UNDER THE COMMUNICATIONS ACT OF 1934, AS AMENDED

Plaintiffs' proposed First Amended Complaint seeks to add additional grounds for relief under the Communications Act of 1934, as amended (the "Act"), arising out of the same alleged misconduct that is set forth in the Complaint. The proposed First Amended Complaint is attached at Exhibit A to the Motion for Leave to Amend Complaint. Plaintiffs seek to include

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ratifications from the PSPs on whose behalf they sue. As noted, more than 800 ratifications have been received to date, and more continue to flow in.

these additional grounds for relief because recent case law has raised questions as to whether a private cause of action is available to independent payphone service providers under 47 U.S.C. § 276, the provision of the Communications Act sued upon. *See, e.g., Greene v. Sprint Communications,* CV 02-3841 (C.D. Cal. July 2, 2002), *appeal docketed,* No. 02-56339 (9th Cir. 2002) (Ex. D hereto) (holding there is no private cause of action), which is presently on appeal. Because the additional grounds for relief arise out of the same alleged misconduct of defendant that is set forth in the Complaint, no difference in proof will be required.

Allowance of plaintiffs' motion for leave to amend will facilitate a full and fair decision on the merits, and defendant will not be prejudiced thereby. A party may amend a complaint after an answer is filed with leave of Court. Fed. R. Civ. P. 15(a). Leave to amend "shall be freely given when justice so requires." *Id.* The purpose of Rule 15(a) is to ensure that cases are decided on the merits, not on pleadings or technicalities. *Foman v. Davis,* 371 U.S. 178, 182 (1962). Consequently, courts apply Rule 15(a) liberally in favor of allowing amendments. *Simplex Time Recorder Co. v. Secretary of Labor,* 766 F.2d 575, 585 (D.C. Cir. 1985); *Albertson v. FCC,* 182 F.2d 397, 400 (D.C. Cir. 1950).

In determining whether to grant a motion for leave to amend, a court will consider whether there has been bad faith, undue delay or prejudice to the defendants, and whether the proposed amendment will be futile. *Foman,* 371 U.S. at 182; *Caribbean*

Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1084 (D.C. Cir. 1998). These four factors, however, are not weighed equally. For instance, while futility may be sufficient to justify a denial of a motion for leave to amend, *see, e.g., Stephenson v. Langston,* 205 F.R.D. 21, 23 (D.D.C. 2001), undue delay, without more, is not, *see, e.g., Caribbean Broad. Sys.,* 148 F.3d at 1084 (*quoting* 6 Wright & Miller, *Federal Practice and Procedure,* § 1488, at 659 (1990 & Supp. 1997)). If none of these four factors is present, leave to amend "should, as the rules require, be 'freely given.'" *Foman,* 371 U.S. at 182 (*quoting* Rule 15(a)).

Plaintiffs' motion for leave to amend their Complaint should be granted because none of the four factors is implicated here. The motion is filed in good faith and without undue delay. The additional grounds for relief were not included originally because plaintiffs did not anticipate the court's decision in *Greene,* which they submit was wrongly decided and is now on appeal. The proposed amendment will not prejudice defendant. This litigation is still in its early stages, and discovery is just beginning. The additional grounds for relief, moreover, do not depend upon any new allegations of fact, since they are based upon the same alleged wrong as is set forth in the Complaint – defendant's failure to pay dial-around compensation as required by FCC orders, rules and regulations.

Finally, the proposed amendment will not be futile under the Communications Act.[10] In addition to their claim under 47 U.S.C. § 276, plaintiffs allege that defendant's failure to fully and fairly compensate the PSPs is an unjust and unreasonable practice prohibited by 47 U.S.C. § 201(b), which declares unlawful "[a]ll charges [and] practices . . . in connection with such communication service . . . that [are] unjust or unreasonable." Defendant's failure to pay compensation is an unjust and unreasonable practice because it violates FCC rules set forth in 47 C.F.R. §§ 64.1300, *et seq.*, pertaining to payphone compensation. The FCC has held on a number of occasions that a violation of its rules is an unjust and unreasonable practice which, accordingly, is prohibited by the Act. *See, e.g., Direct Impact Telecomm., Inc. v. American Teletronics Long Distance, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 4891, 4896, ¶ 7 (1997) ("failure to obtain . . . permission [to change a subscriber's long distance carrier] is a violation of the Commission's rules and is therefore an unjust and unreasonable practice under Section 201(b) of the Act.").

Plaintiffs further allege that defendant has violated 47 U.S.C. § 416(c), which provides that "[i]t shall be the duty of every person, its agents and employees and any receiver or trustee thereof, to observe and comply with such *orders* so long as the

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[10] We address standing in Section III, *infra*.

same shall remain in effect." The word "orders" has been interpreted broadly by the courts and includes FCC orders made pursuant to its rulemaking authority, as well as FCC rules and regulations. *See South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 744 F.2d 1107, 1117-18 (5th Cir. 1984) (*vacated on other grounds, Louisiana Pub. Serv. Comm'n v. South Cent. Bell Tel. Co.*, 476 U.S. 1166 (1986)). Accordingly, defendant's violation of FCC rules and orders pertaining to payphone compensation constitutes a violation of Section 416(c).

Plaintiffs also allege that defendant has violated 47 U.S.C. § 407, which provides that "[i]f a carrier does not comply with an order for the payment of money," the person for whose benefit the order was made may sue for damages in district court. The FCC's orders requiring long distance carriers to pay payphone compensation constitute "orders" for the payment of money within the meaning of Section 407.[11] Accordingly, because defendant's failure to compensate payphone service providers is a violation of Section 416 of the Act, they (or their assignees or

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[11] While the case law under Section 407 is sparse, courts addressing related section 401(b) have held that the word "order" should be interpreted broadly and is not limited to orders promulgated by the FCC pursuant to an adjudicatory proceeding. *See, e.g., Hawaiian Tel. Co. v. Pub. Util. Comm'n of State of Hawaii*, 827 F.2d 1264, 1270-72 (9th Cir. 1987). Courts interpreting the word "order" in related contexts have held that it includes FCC orders in rulemaking proceedings. *See, e.g., South Cent. Bell*, 476 U.S. at 1166.

representatives) may sue in district court to recover damages caused by that failure.

Plaintiffs' amendment, accordingly, should be allowed.

III. AMENDMENT TO PERMIT JOINDER SHOULD BE ALLOWED IF THIS COURT ADHERES TO ITS DECISION IN *AT&T* THAT PLAINTIFFS LACK STANDING

This Court's decision in *AT&T* notwithstanding, the plaintiff aggregators submit that, under controlling Supreme Court precedent, they have standing under Article III of the United States Constitution to pursue this lawsuit. Plaintiffs have standing on two alternative grounds, either of which is constitutionally sufficient: as assignees of the PSPs to which defendant owes dial-around compensation; and as representatives of the PSPs on whose behalf they sue.

It is well-settled under longstanding Supreme Court precedent that assignees of the legal title to a claim – such as plaintiffs here – may bring suit in their own name. It is irrelevant that the plaintiffs will account to the PSPs for the funds they collect. Assignments of claims for purposes of collection have long been recognized as transferring legal title, enabling the assignee to sue in its own name even though it must account to its assignor for whatever is recovered. As demonstrated in Section III.B, *infra* plaintiffs have standing as assignees. Alternatively, as set forth in Section III.C, *infra,* if the Court finds

that the assignments were not effective, plaintiffs have standing as agents of the PSPs. As plaintiffs have standing either as assignees or agents, any contention that plaintiffs fail the test for "associational" standing is irrelevant and, in any case, is incorrect, as explained in Section III.D, *infra*.

If the Court determines that plaintiffs here lack standing, however, and that ratifications from the PSPs authorizing the initiation of this lawsuit on their behalf are insufficient, plaintiffs seek leave to file a First Amended Complaint pursuant to Rule 17(a) of the Federal Rules of Civil Procedure, within 30 days after entry of the Court's Order. This Amended Complaint, in addition to adding the additional grounds for relief set forth in Section II, *supra,* joins the PSPs as named party plaintiffs. Any defect in pleading is curable by joinder, and any opposition by defendant to amendment of the complaint is nothing more than an unprincipled effort to avoid liability for millions of dollars in dial-around compensation that it unlawfully withheld from the PSPs. For there can be no doubt that, in any new suit brought by the PSPs, defendant will argue that their claims for compensation for the millions and millions of compensable calls made over its network more than two years prior to suit are timebarred.[12]

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[12] This suit was filed in the United States District Court for the District of Columbia on March 30, 2001, and was dismissed without prejudice on July 25, 2001 to enable the parties to pursue settlement discussions. Plaintiffs refiled on January 29,

(Continued on following page)

A. Standard Of Review

While plaintiffs have the burden of demonstrating that they have Article III standing, *see AT&T*, 2003 WL 1633523, this Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the [plaintiff aggregators]." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).[13]

2002. A tolling agreement was in effect during the interim period. Plaintiffs seek damages for all compensable calls that defendant has carried since October 1, 1998. While the applicable statute of limitations is two years, 47 U.S.C. § 415, payments are calculated on a calendar quarterly basis and there is a quarterly lag in payment, so the payment obligation does not accrue, and the limitations period does not begin to run, until the first day of the calendar quarter following the next succeeding calendar quarter. If this suit is dismissed and the PSPs are forced to file a new action in their own name, defendant without doubt will argue that it has no liability for millions of dollars of compensable calls it profited from over a period in excess of two years. ***In the meet and confer conference held prior to the filing of plaintiffs' Motion defendant refused to consent to amendment of the Complaint to join the PSPs as named plaintiffs.***

[13] Plaintiffs recognize that this Court may look to the assignments, other agreements entered into between them and the PSPs, and newly obtained ratifications, in addition to the Complaint, in determining whether they have standing. Standing here, however, presents essentially legal and not factual issues for determination. To the extent that standing depends upon the resolution of disputed issues of fact, it would not be susceptible to summary disposition. *See Walker v. Jones*,. 733 F.2d 923, 933 n.16 (D.C. Cir. 1984).

B. Plaintiffs Have Standing As Assignees Of The PSPs

Plaintiffs have standing as assignees of the PSPs under longstanding Supreme Court precedent, going back at least as far as *Spiller v. Atchison, Topeka & Santa Fe Railway Co.*, 253 U.S. 117 (1920), and affirmed most recently in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). As set forth above, the PSPs listed in Exhibits A through E to the Complaint executed assignments conveying to the plaintiff aggregators "all rights, title and interest" in their "claims, demands or causes of action for 'Dial-Around Compensation.'" This Court, in its *AT&T* decision, recognized that the **PSPs** would have standing to sue in their own name, but held that the plaintiff aggregators did not because the assignments "d[id] not shift the loss suffered by the PSPs to the aggregators that represent them," "grant only the right to sue and not a right to a remedy," and were not "obtain[ed by the plaintiff aggregators] . . . in exchange for consideration to the PSPs." 2003 WL 1633523. This Court, however, was in error on each of these points, and in holding as it did it ignored *Spiller* and misapplied the holdings of *Vermont Agency* and *Connecticut v. Physicians Health Services of Connecticut, Inc*, 287 F.3d 110 (2d Cir. 2002) to the facts of this case.

Spiller was a suit brought by the secretary of a cattle raisers' association under Section 16 of the Act to Regulate Commerce, as amended, to recover damages awarded under a reparation order made by the

Interstate Commerce Commission ("ICC") for unlawful freight overcharges on cattle shipments. The plaintiff sued as assignee of some, but not all, of the overcharge claims.[14] The gravamen of the complaint was that the rates charged and collected from the shippers were unreasonable and excessive in violation of the Act. The district court granted judgment in favor of the secretary of the association, but the Eighth Circuit reversed, holding that legal title to the claims for reparation had never vested in the secretary of the association. The Eighth Circuit so held because the assignments were made for nominal consideration, and the association was prosecuting the overcharge claims for the benefit of the shippers. It further held that the purpose of the assignment precluded the vesting of legal title to the claims in the secretary. *Spiller,* 253 U.S. at 133-34.

The Supreme Court reversed:

> The assignments were absolute in form, and plainly their effect – supposing the claims to be assignable – was to vest the legal title in [the association secretary]. What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award of reparation and enable him to

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[14] The secretary of the association, like the plaintiff aggregators here, was not seeking to recover overcharges to **all** of the association's members, but only overcharges on those claims assigned to him.

> recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments. [*Id.* at 134.][15]

Thus, this Court's holding in *AT&T,* that an assignee must itself have a concrete interest in the outcome of the litigation, and that the plaintiff aggregators did not have such a concrete interest because any damages they collect will be remitted to the PSPs, runs directly counter to *Spiller.* For the secretary of the association in *Spiller* did not himself have a concrete interest in the outcome of the litigation. He was obligated to remit the proceeds of suit to the members of the association that had consented to his bringing suit on their behalf. Nonetheless, the Supreme Court upheld his right to sue. Here, as in *Spiller,* the assignments are "absolute in form," and "plainly their effect . . . was to vest the **legal title** in [the plaintiff aggregators." (Emphasis added.) Here, as there, the assignments "did not pass . . . beneficial or equitable title . . . [b]ut this was not necessary to support the right of the [plaintiff aggregators] to claim an award of [damages] and enable [them] to

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[15] *See also Honey v. George Hyman Construction Co.,* 63 F.R.D. 443, 447 (D.D.C. 1974); 6 Am. Jur. 2d Assignments § 177 (1999); *DeBenedictis v. Hagen,* 77 Wash. App. 284, 890 P.2d 529 (1995) (assignment of claim for purposes of collection transfers legal title, enabling the assignee to sue in its own name even though it must account to its assignor for whatever is recovered).

recover [those damages] by action at law brought in [their] own name but for the benefit of the equitable owners of the claims [*i.e.*, the PSPs]; especially since it appeared that such was the real purpose of the assignments."

Vermont Agency is to like effect. That was a *qui tam* action brought under the False Claims Act to remedy an injury suffered, not by the relator, but by the United States. 529 U.S. at 770. Under the False Claims Act, a *qui tam* relator is entitled to receive a share of any proceeds from the action, ranging from 15 to 30%, depending on whether the United States intervenes. *Id.* at 769-70. In *Vermont Agency,* the Supreme Court addressed the very distinct standing issues as to the 70 to 85% interest retained by the United States, and the 15 to 30% interest assigned to the relator.

As to the interest retained by the United States, the Supreme Court found that the "injury in fact" component to standing was satisfied because the relator was "simply the statutorily designated agent of the United States, in whose name . . . the suit is brought." *Id.* at 772 (emphasis deleted). The Court held, however, that this basis for standing did **not** suffice for the 15 to 30% interest assigned to the relator, which is the direct analog of the 100% interest assigned to the plaintiffs here. With respect to the assigned interest, the Court stated that: "For the portion of the recovery retained by the relator, . . . some explanation of standing other than agency for the Government must be identified." *Id.* The Supreme

Court went on to hold that the relator had standing with respect to his 15 to 30% interest in the recovery, **but not because of that interest**. Rather, the Supreme Court found that a constructive assignment had been made under the statute, and held that there was standing based on "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor," *id.* at 773:

> We believe . . . that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The [False Claims Act] can reasonably be regarded as effecting a partial assignment of the Government's damages claim. Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits, . . . and also suits by subrogees, who have been described as "equitable assign[ees]," . . . We conclude, therefore, that the United States' injury in fact suffices to confer standing on [the relator]. [*Id.* at 773-74 (citations and footnote omitted)]

Thus, this Court's holding in *AT&T,* that under *Vermont Agency,* an assignee must itself have a concrete interest in the outcome of the litigation, as did the relator by virtue of the "bounty" he would receive if he prevailed, and that the plaintiff aggregators did not have such a concrete interest because any damages they collect will be remitted to the PSPs, not

only runs counter to *Spiller,* but turns *Vermont Agency* on its head. For, the Supreme Court in *Vermont Agency* made clear that the relator's "bounty," or anticipated recovery from the proceeds of the litigation, not only was not a requirement for standing, as this Court apparently found, but was **insufficient** to confer standing, despite the fact that it gave the relator a "'concrete private interest in the outcome of [the] suit.'" It so held because

> the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. . . . The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. . . . A *qui tam* relator has suffered no such invasion – indeed, the "right" he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. . . . [A]n interest that is merely a "byproduct" of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes. [*Id.* at 772-73 (citations omitted)]

The Supreme Court, in short, found standing in *Vermont Agency* by virtue of a constructive assignment even though the relator, like plaintiff aggregators here, himself suffered no compensable injury, and even though (unlike here) the relator gave no consideration for his claim. *See* p. 7, *supra;* p. 21 and n.19, *infra*. Moreover, the financial interest in the proceeds of the litigation, which this Court evidently viewed as

the *sine qua non* of standing, was **rejected** by the Supreme Court as a basis for standing, both in *Spiller* and in *Vermont Agency*. That the relator in *Vermont Agency* was entitled to a "bounty" was irrelevant. Under the Supreme Court's analysis, the relator would have had standing even if he had received no share of the recovery, *see* 529 U.S. at 773-74, as was the case in *Spiller*. *See Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1282 (9th Cir. 1983) (fact that assignors retained interest in proceeds did not make association assignee of claims an improper party plaintiff).

The assignments at issue here, moreover, are as valid as the assignments in *Spiller*.[16] The Supreme Court there rejected the freight carriers' argument that the Commerce Act did not permit an assignment of a claim for reparation to a third party, but by its express terms permitted suit only by the person aggrieved:

> [W]e attribute no controlling significance to [the absence of language expressly extending the remedy to the representatives or assigns of the person aggrieved]. The provisions of the act giving redress, compensatory in its nature, to persons sustaining pecuniary injury through the violation of public duty by the carrier must receive a reasonably liberal and not a narrow interpretation. A claim for

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[16] This Court in *AT&T* did not reach the issue of the validity of the assignments. *See* 2003 WL 1633523, at *2.

> damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty but for compensation, is a property right assignable in its nature . . . , and must be regarded as assignable at law, in the absence of any expression of a legislative intent to the contrary. We find nothing in the letter or spirit of the act inconsistent with such assignability. [253 U.S. at 135 (citations omitted)]

Similarly, the PSPs' claims here, for damages arising out of the carriers' violation of their public duty to pay dial-around compensation for all completed access code and toll calls, are property rights assignable in their nature and at law. There is, moreover, nothing in the letter or spirit of the Communications Act indicative of a legislative intent to the contrary.[17]

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[17] The validity of the assignments here is governed by federal, not state, law. *Spiller* is particularly instructive in this regard, because in *Spiller* the Court held that, under the Interstate Commerce Act ("ICA"), the assignment at issue was valid. 253 U.S. at 134-35. The assignment in this case is similarly valid under federal law since the Communications Act arises from and is modeled after the ICA. *See AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 222 (1998) (because section 203(a) of the Communications Act was modeled after the ICA, the filed rate doctrine principles associated with the ICA apply to the Communications Act); *American Broadcasting Companies, Inc. v. FCC*, 643 F.2d 818, 821 (D.C. Cir. 1980) (cases decided under the ICA are controlling precedent for interpreting the effect of tariffs under the Communications Act); *AT&T v. New York City Human Resources Admin.*, 833 F. Supp. 962, 979 (S.D.N.Y. 1993) (cases involving the filed rate doctrine under the ICA are controlling precedent for cases

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The Second Circuit's decision in *Physicians Health,* 287 F.3d 110, which this Court relied upon in *AT&T,* does not support dismissal of this action for lack of standing, because the assignments in that case did not, as they do here and as they did in *Spiller* and *Vermont Agency,* transfer legal title to the claims at issue to the named plaintiff. Plaintiffs respectfully submit that the Court's decision to the contrary is simply wrong and should not be followed here.

In *Physicians Health,* a group of policyholders asserted that their insurance company's drug formulary system violated ERISA. The policyholders assigned their right to equitable relief under ERISA to the State of Connecticut, **but did not transfer their legal title to the claim or the right to sue for and to collect money damages**. The only relief obtainable in the suit by the State of Connecticut – equitable relief – by definition could not run in its favor. Any such relief, rather, would flow directly and only to the policyholders. The State of Connecticut,

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under the Communications Act); *A Bill to Provide for the Regulation of Interstate and Foreign Communication by Wire or Radio, and for Other Purposes: Hearing on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce,* 73rd Cong. 14-15 (1934) (statement of Dr. Irvin Stewart, Department of State) ("Title II [of the Communications Act] is the substance of the bill and is based largely upon the Interstate Commerce Act." Similarly, "[s]ection 206, liability of carriers; section 207, complaints and suits for damages; section 208, reparation proceedings; and section 209, orders for the payment of money, are taken largely from the Interstate Commerce Act.")

moreover, made no promise in return to prosecute the assignors' claims or to provide any other type of consideration; and the policyholders remained free to initiate suit at any time to recover damages. *Physicians Health,* 287 F.3d at 113-15. Thus, neither the claim itself, "[nor any] of the remedies being sought would flow to the State as assignee." *Id.* at 118. Under these circumstances, the Second Circuit held the State of Connecticut did not have standing.

The instant situation is readily distinguishable from *Physicians Health,* for here the PSPs transferred their legal title to the claim, *i.e.,* "all [of their] rights, title and interest . . . in the . . . claims, demands or causes of action for 'Dial-Around Compensation.'" *See* Ex. B hereto. This transfer of legal title to the claim included within it the right to sue for **all** relief to which the PSPs are entitled, including the legally cognizable right to collect money damages. The plaintiff aggregators, in return, promised to prosecute the PSPs' claims for dial-around compensation. Indeed, that was the very purpose of the assignments. They also promised to account for the proceeds and to keep the PSPs advised as to the progress of the litigation and collection efforts.

The PSPs' transfer of their legal rights to the claims should be given effect regardless of whether the PSPs retained equitable ownership of the proceeds of the claims. As the Second Circuit recognized in *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.,* "[i]n general, claims or choses in action may be freely transferred or assigned to others." 106 F.3d 11,

17 (2d Cir. 1997). In order to do so, "the owner [need only] manifest 'an intention to make the assignee the owner of [the] claim;'" and, if "the language manifests [the] intention to transfer at least title or ownership," then "[t]he validity of [the] assignment . . . is not affected by the parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought on the claim." *Id.* In short, unlike the illusory right to equitable relief that could run only in favor of the policyholders and not in favor of the State of Connecticut, the right to collect damages is a legally cognizable one that does run in the plaintiff aggregators' favor regardless of whether they have to account to the PSPs for the proceeds of this litigation. Assignment of the right to collect damages, moreover, forecloses the PSPs themselves from pursuing an independent action to recover those very damages, thereby obviating the significant and real risk, present in *Physicians Health,* that there would be no finality to the litigation because the cause of action, having been split, exposed the defendant to the risk of multiple suits.

The Second Circuit, in *Physicians Health,* citing *Vermont Agency,* 529 U.S. at 773, recognized that, "in at least some cases, an 'assignee of a claim [does have] standing to assert the injury in fact suffered by the assignor.'" 287 F.3d at 117:

> Typically, the assignee, obtaining the assignment in exchange for some consideration running from it to the assignor, replaces the assignor with respect to the claim or the

> portion of the claim assigned, and thus stands in the assignor's stead with respect to both injury and remedy. [*Id.*]

Here, the plaintiff aggregators have replaced the PSPs with respect to the entirety of the claim and stand in those PSPs' stead as to both injury and remedy. The plaintiff aggregators also gave consideration in exchange for the assignment. The consideration here, running from the assignee plaintiff aggregators, includes, *inter alia,* the promise to prosecute the claim for dial-around compensation, to keep the PSPs apprised of the progress of the litigation and collection efforts, and to account for any recoveries. *See Klamath-Lake,* 701 F.2d at 1282 (adequate consideration consisted of transfer of authority to bring suit and to allocate proceeds, and agreement to bring suit). This Court was thus in error in maintaining that the plaintiff aggregators did not provide any consideration to the PSPs. *See APCC Services,* 2003 WL 1633523, at *3.

The Second Circuit in *Physicians Health,* moreover, further noted that,

> There are also situations where, even though an assignee incurs no injury, expense, or loss in exchange for the assignment, a valid and binding assignment of a *claim* (or a portion thereof) – not only the right or ability to bring suit – may confer standing on the assignee. [287 F.3d at 117.]

Thus, even absent the plaintiff aggregators incurring any "injury, expense, or loss in exchange for the

assignment," they would have standing. Unlike *Physicians Health,* where the assignment was in essence illusory because the assignor policyholders never assigned their "claim" to the State of Connecticut, but only the right to seek one form of relief that, if the suit was successful, would run directly to the assignors, the assignments here assigned, transferred and set over to the plaintiff aggregators "all rights, title and interest" of the PSPs in the "claims" against defendant for dial-around compensation, including the right to collect damages. In no way can this assignment be viewed as illusory, for the outcome of this suit, whether by way of settlement or judgment, will bind the PSPs with respect to any rights they held pre-assignment for the dial-around compensation for which plaintiffs sue.

This Court thus was in error when it concluded in *AT&T* that *Physicians Health* was directly on point. The PSPs' assignments to the plaintiff aggregators, unlike the assignments in *Physicians Health,* did transfer the legal right to the claims and to money damages, and so the remedies sought will flow to the plaintiff aggregators as assignees. The plaintiff aggregators here have replaced the PSPs with respect to the PSPs' claims for dial-around compensation and stand in their stead with respect to both injury and remedy. That the proceeds of the litigation are to be remitted to the PSPs does not render the transfer of the legal right to sue for and collect damages a nullity, any more than it rendered the transfers a nullity in *Spiller.*

This Court also was in error in concluding that the aggregators' interest was insufficient to confer standing because it was "'merely a byproduct' of the suit and not an interest in compensation for a violation of a legally protected right," whereas the relator's interest in *Vermont Agency* was the bounty he was to receive, which "directly related to the assignor's original injury." *See AT&T,* 2003 WL 1633523, at *3, 4. For in *Vermont Agency,* the Supreme Court held that the relator's bounty in fact was "merely a by-product' of the suit," and that his only constitutionally cognizable interest was derivative of the injury in fact suffered by the assignor. *See* 529 U.S. at 773. Thus, the aggregators' injury sufficient to confer standing is the injury sustained by the PSPs, and the fact that the aggregators agreed to remit the proceeds of suit to the PSPs is of no more consequence to a determination of their standing than the relator's interest in his bounty was to a determination of his.

Accordingly, the PSPs' assignments of their compensation claims transferred their legal interest in those claims and the right to recover damages. Under binding Supreme Court precedent, those assignments were sufficient to confer standing on the plaintiff aggregators.

C. Alternatively, Plaintiffs Have Standing As The Designated Agents Of The PSPs On Whose Behalf They Sue

In the first prong of *Vermont Agency,* the Supreme Court held that the relator had standing to sue

as the agent of the United States and in its name, to redress an injury it suffered, with respect to the 70 to 85% of any recovery he was required to remit to it. *See* 529 U.S. at 772. In the event this Court determines that the assignments were not effective to convey the PSPs' claims to the plaintiff aggregators and, therefore, that the plaintiffs do not have standing as assignees, then, in the alternative, it should hold that the plaintiffs have standing as the agents of the PSPs. That the plaintiff aggregators sued in their own names, and not in the names of the PSPs "ex rel.," should not be accorded legal significance. It would elevate form over substance to say that the Complaint here did not accomplish the same thing as the relator's complaint in *Vermont Agency*, simply because it did not include in its caption the name of every PSP but, rather, listed them in exhibits thereto. This is particularly so where, as here, the Complaint makes clear that the action was "brought [by the plaintiff aggregators] **on behalf of** hundreds of [PSPs]," Compl,, ¶ 1 (emphasis added), and refers repeatedly to the PSPs as "plaintiffs."[18] Just as the

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[18] *See, e.g.*, Compl., ¶ 1 ("**The Plaintiffs, known in the telecommunications industry as independent payphone service providers**, bring this action to collect compensation that Defendant . . . currently owes **the Plaintiff independent payphone service providers** for completed access code and toll free calls that have been made since October 1, 1998 using **Plaintiffs' payphones** and carried over [Defendant's] telephone network facilities. [Defendant] is required to pay to **the Plaintiff independent payphone service providers** compensation for each such call, . . . ") (emphasis added); ¶ 14

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relator in *Vermont Agency* had the right to prosecute the action in the name of the United States where the United States chose not to join, so, too, the plaintiff aggregators here should have the same right to prosecute this action in the name of the PSPs who have signified their consent to such a procedure.

D. This Court's Conclusion In *AT&T* That The Plaintiffs Aggregators Lack "Associational Standing" Is Irrelevant And Erroneous In Any Event

As discussed above, plaintiffs have standing as assignees or agents. Accordingly, this Court need not reach, as it did in *AT&T,* the issue of associational standing under *Hunt v. Washington State Apple Advertising Comm.,* 432 U.S. 333 (1977). In *AT&T,*

("**Plaintiff independent payphone service providers** recover the cost of their payphone services and facilities by receiving payment for the use of those payphones either from callers or from carriers.") (emphasis added); ¶ 36 ("On **Plaintiff independent payphone service providers'** payphone lines on which Flex ANI was available on or before March 1, 1998, [Defendant] was required to pay **Plaintiff independent payphone service providers** for each and every completed [Defendant] access code call and toll free call placed from their payphones during the 2nd calendar quarter of 1998.) (emphasis added); ¶ 41 ("As a result of [Defendant's] violation of the FCC's requirements, **Plaintiff independent payphone service providers** have been damaged through [Defendant's] failure to pay **Plaintiff independent payphone service providers** for the total number of compensable calls that [Defendant] is required to pay pursuant to the Act and the rules, regulations, and orders issued by the FCC.") (emphasis added).

this Court held that the plaintiff aggregators did not have associational standing because such standing generally is not recognized where individualized proof of damages, or participation in discovery or trial, is required. *See AT&T*, 2003 WL 1633523, at *20-24.[19] This is not, however, a typical association-type case, but even if it were, judging this case under the *Hunt* criteria, plaintiffs here would have standing.

This is not a typical association-type case because the plaintiff aggregators are not suing as membership associations seeking to represent their members generally, *i.e.*, they are not suing on behalf of **all** the PSPs on whose behalf they collect or

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[19] In *AT&T*, this Court recognized that the plaintiff aggregators satisfy the first two prongs of associational standing set forth in *Hunt*, 432 U.S. at 343: the plaintiff aggregators' customer PSPs would have standing to sue in their own right; and the interests the plaintiff aggregators seek to protect are germane to their purpose. *See AT&T*, 2003 WL 1633523, at *5-6. Moreover, like the state agency in *Hunt*, the interests of the plaintiff aggregators may be adversely affected by the outcome of this litigation, *see Hunt*, 432 U.S. at 345. In addition, at least one plaintiff, APCCS, gave $100,000 in seed money to fund the litigation, and one other, Intera, is entitled to a share of the proceeds of this litigation. *See* Ex. E hereto (Declaration of Sean Venezia), ¶ 4. As was true in *Hunt*,

> This financial nexus between the interests of the [plaintiff aggregators] and [their] constituents coalesces with the other factors noted above to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of [the issues before the court]." [*Id.*, quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962).]

collected dial-around compensation. Like the association secretary in *Spiller,* they are suing as assignees, or, alternatively, as the "designated agents," **only** of those of their PSP customers that affirmatively have assigned their claims or consented to such agency, and who also have agreed to participate in the litigation and to be bound by its results.[20]

Thus, the facts here are materially different from those present in all of the associational standing cases which this Court cited in *AT&T. See* 2003 WL 1633523, at *20-24. In those cases, unlike the situation here, the associations were suing on behalf of their members generally, without having sought, or obtained, their myriad members' affirmative consent to suit, agreement to participate in discovery, and agreement to be bound by the results.[21] Accordingly,

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[20] If the Court reaches the *Hunt* criteria, the fact that the plaintiff aggregators are not traditional "associations" and that the PSPs are not "members" are irrelevant, given the plaintiff aggregators' role in the industry set forth above. In *Hunt,* the Supreme Court found the plaintiff's status as a state agency rather than "a traditional voluntary membership organization" to be immaterial to its analysis of associational standing given that agency's purpose and functioning. *See* 432 U.S. at 344-45. In so holding, it expressly refused to "exalt form over substance to differentiate between the [state agency] and a traditional trade association representing the individual growers and dealers who collectively form its constituency." *Id.* at 345. The same result should obtain here.

[21] *See Hunt,* 432 U.S. 333, *Telecommunications Research & Action Center v. Allnet Communication Servs., Inc.,* 806 F.2d 1093 (D.C. Cir. 1986); *Air Transport Ass'n v. Reno,* 80 F.3d 477 (D.C. Cir. 1996); *Pa. Psychiatric Society v. Green Spring Health*

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any effort to collect damages on the individual members' behalf would have presented substantial problems of cooperation and proof, without any offsetting benefit of finality.

That is not the situation here, and thus the traditional association-type cases have no bearing on whether the plaintiff aggregators have standing as assignees, as agents of the PSPs, or as associations suing on the PSPs' behalf. Indeed, that individualized proof of damages may be required is of no more moment here than it was in *Spiller* and *Vermont Agency,* where the Supreme Court found standing even though individualized proof of damages was required and there was no evident promise of cooperation given by the injured parties.[22] As the Supreme

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Servs., Inc., 280 F.3d 278 (3d Cir. 2002); *The Legal Aid Society v. City of New York,* 114 F. Supp. 2d 204, 213-14 (S.D.N.Y. 2000); *Dallas Police Ass'n v. City of Dallas,* 1999 WL 604850, at *2 (N.D. Tex. 1999); *Chicago Journeymen Plumbers' Local Union 130, U.A. v. Personnel Bd.,* 154 L.R.R.M. (BNA) 2915, 1996 WL 288631, at *2 (N.D. Ill. 1996).

[22] Plaintiff aggregators submit that the individual participation of the underlying PSPs would not be required here in any event because the relevant information – the unique number assigned to each payphone and the required information digits for each payphone or payphone line – already is in the possession of defendant and/or the plaintiff aggregators. The PSPs provided information with respect to the unique numbers assigned to each of their payphones to the plaintiff aggregators in the normal course of their efforts to have the aggregators collect compensation for dial-around calls on their behalf; and, as part of this same effort, the plaintiff aggregators already have submitted this information to defendant (or defendant's own

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Court in *Vermont Agency* noted, standing by assignment, like associational standing, is a particularized form of representational standing, 529 U.S. at 773, and it would be nonsensical to hold that the plaintiff aggregators would have standing to sue defendant with respect to the damages sustained by each PSP had they filed 1,000 or more separate suits, but do not have standing here simply because, for reasons of efficiency and convenience, they brought one comprehensive action.

Even if this case were viewed as a typical association-type case, moreover, plaintiffs would fall within a recognized exception to the third limitation set forth in *Hunt:* associations may seek damages on behalf of their members when defendants have challenged plaintiffs' standing late in the case and a denial of standing would prejudice plaintiffs. *See Middlewest Motor Freight Bureau v. U.S.*, 525 F.2d 681, 683 (8th Cir. 1975) (finding undue prejudice because independent prosecution of claims would be barred by the statute of limitations). Application of this exception would be particularly appropriate here, since defendant has not even challenged plaintiffs'

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clearinghouse agent). Moreover, the required information digits for each payphone or payphone line that assist carriers such as defendant in identifying and tracking payphone calls are transmitted to carriers only by the local phone companies, not the payphones themselves. Further, defendant knows, or should know under the FCC's requirements, whether it received these ANI digits on its network. Accordingly, defendant (but not the PSPs) already is in possession of this information.

standing, and dismissal on standing grounds would subject the PSPs to an argument by defendant in any new actions they file that a significant portion of their claims, worth millions of dollars, is time barred. *See* n.12, *supra*.

Such an exception is constitutionally cognizable because this prong of *Hunt* is a prudential, not a constitutional, one:

> once an association has satisfied *Hunt's* first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a **constitutional** necessity for anything more.

United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 556 (1996). Accordingly, "the third prong of the associational standing test is best seen as focusing on . . . matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *Id.*

There are no prudential considerations militating against allowing this action to proceed. The three policy reasons underlying the third prong of *Hunt* (*see United Food and Commercial Workers*, 517 U.S. at 556) – the desire for adversarial intensity, protection against the risk that detailed records or the evidence necessary to show damages will not be available, and hedging against the risk that the damages recovered by the association will not find their way into the pockets of the members on whose behalf damages are

sought – are not present here. The plaintiff aggregators have the adversarial interest necessary to litigate this case to conclusion and every incentive to do so, since, even apart from their contractual undertaking, their success depends on their ability to satisfy the PSPs that utilize their services. Defendant already possesses the records needed to prove damages (*e.g.*, records of each dial-around call made from each payphone and of the ANIS of each PSP), and each PSP on whose behalf the plaintiff aggregators have sued has agreed to produce whatever records it has. Finally, the damages that will be recovered by plaintiffs will be given to the PSPs, since the sole purpose of plaintiffs and this suit is to collect and remit that very compensation. *See AT&T,* 2003 WL 1633523, at *5.

E. Standing Should Be Recognized In Any Event Where, As Here, The PSPs Have Ratified Commencement Of This Suit By The Plaintiff Aggregators, New Ratifications Have Been Obtained, And Additional Ratifications Are Forthcoming If Required By The Court

Even if this Court were to find that the assignments were insufficient to transfer legal title to the PSPs' claims for dial-around compensation and that the PSPs should have been named as plaintiffs, it should accept the assignments as *de facto* ratifications under Rule 17(a), or it should accept new ratifications that the PSPs are executing. Under Rule

17(a), no action may be dismissed on the ground that it is not prosecuted in the name of the real party in interest "until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest," and "such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." Rule 17(a) codified the salutary principle that an action should not be dismissed because of an honest mistake, thereby protecting against forfeiture of "just claims." *See* Fed. R. Civ. P. 15 and 17, Advisory Committee Notes (1966).

As discussed above, this Court found in *AT&T* that the plaintiff aggregators would have associational standing but for the third prong of *Hunt,* and this prong is a prudential, not constitutional, one that focuses on "matters of administrative convenience and efficiency." *United Food and Commercial Workers,* 517 U.S. at 556. Accordingly, any alleged infirmity under this prong can be satisfied by Rule 17(a) ratifications, which are particularly appropriate here because any argument that suit should have been filed in the name of the PSPs reduces to the proposition that they, not the plaintiff aggregators, are the real parties in interest. *See, e.g., Advanced Magnetics,* 106 F.3d at 20; *accord Honey,* 63 F.R.D. at 447.

A proper ratification pursuant to Rule 17(a) requires only that the ratifying party authorize continuation of the action and agree to be bound by the lawsuit's result. *See, e.g., In re Vitamins Antitrust*

Litigation, No. 99497, 2001 WL 755852 (D.D.C. June 7, 2001), at *3, n. 6; *ABB Daimler-Benz Transp. (North America), Inc. v. National R.R. Passenger Corp.,* 14 F. Supp. 2d 75, 84 (D.D.C. 1998). The assignments here should be accepted as *de facto* ratifications because they do just that: they authorize the plaintiff aggregators to "do all acts necessary for the purpose of collecting [dial-around compensation]," "select[ ] and retain[ ] legal counsel," and "fil[e] and prosecut[e] court . . . proceedings," while confirming the PSPs' agreement to be "bound by final determinations in court." *See* Ex. B hereto. Requiring the PSPs to execute yet another document to like effect would serve no useful purpose, as was held in *Honey,* 63 F.R.D. at 447. Because the assignments in that case showed that the assignors intended the named plaintiff to bring suit on their behalf, the court held that it would "not require a meaningless act. . . . No purpose would be served by requiring [the assignors] to execute a virtually identical document." *Id.* at 448. It therefore accepted the assignments as ratifications and allowed the suit to proceed. *Id.*

Nevertheless, in an excess of caution following this Court's decision in *AT&T,* the plaintiff aggregators have sought, and continue to receive, new ratifications from the PSPs. *See* Ex. C to Motion (Felgar Decl.), ¶¶ 3-5.[23] In those ratifications, the PSPs ratify

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[23] Over 800 ratifications have been received to date from the PSPs listed on Exhibits A through E to the Complaint. Copies

(Continued on following page)

the commencement of this action on their behalf, authorize the continuation of this action in the plaintiff aggregators' own name, agree to be bound by any judgment, and agree not to institute a separate action against defendant arising out of the facts pled. Such ratifications are sufficient to cure any standing defect. *See, e.g., Comet Rice, Inc. v. Robertshaw,* No. 492 CV 278, 1995 WL 1945551, at *3 (N.D. Miss. Feb. 1, 1995) (ratification cured any standing deficiency). *Accord Gusto Records, Inc. v. Artists Rights Enforcement Corp.,* No. 88 Civ. 0527, 1992 WL 26746 (S.D.N.Y. Feb. 4, 1992); *B.R.I. Coverage Corp. v. Air Canada,* 725 F. Supp. 133 (E.D.N.Y. 1989); *Prosperity Realty, Inc. v. Haco-Canon,* 724 F. Supp. 254, 258 (S.D.N.Y. 1989); *Amico v. New Castle County,* 571 F. Supp. 160, 165 (D. Del. 1983); *see generally, National Safe Corp. v. Texidor Security Equip., Inc.,* 101 F.R.D. 467 (D.P.R. 1984); *Clarkson Company Ltd. v. Rockwell International Corp.,* 441 F. Supp. 792, 797-98 (N.D. Cal. 1977).

Thus, under the express provisions of Rule 17(a), the PSPs' ratifications, whether in the form of the original assignments or the newly executed ratifications, are sufficient to confer standing if the assignments are not deemed sufficient to do so. Because the ratifications effectively prevent the PSPs from filing their own suits against defendant for the same

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are attached to the Declaration of Robert N. Felgar (Ex. C to Motion).

claims, they serve Rule 17(a)'s modern function of "protect[ing[the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Fed. R. Civ. P. 17, Advisory Committee Notes (1966); *see In re Vitamins Antitrust Litigation,* 2001 WL 755852, at *4-6 (denying motion to dismiss claims asserted on behalf of plaintiffs' affiliated companies for lack of standing where affiliated companies agreed to cooperate in discovery and to be bound by the result, thereby obviating any risk of multiple recoveries; while recognizing that formal ratifications were unnecessary in light of this, court out of an abundance of caution required affiliates to file formal ratifications); *see also* 6A Wright & Miller, *Federal Practice and Procedure,* § 1555, at 418 (1990).

F. Alternatively, joinder Of The PSPs Should Be Allowed If The Court Determines That The Plaintiff Aggregators Lack Standing

As set forth above, plaintiffs have moved for leave to amend their Complaint to assert additional grounds for recovery under the Communications Act based on the same alleged misconduct set forth in the Complaint. However, in the event this Court determines that the plaintiff aggregators are not proper party plaintiffs, that the assignments are not *de facto* ratifications, and that the new ratifications do not suffice, plaintiffs seek leave in the alternative to amend their complaint to join the PSPs that have

consented to such joinder in addition to adding the new bases for relief under the Communications Act. An alternative proposed First Amended Complaint is appended at Exhibit B to plaintiffs' Motion for Leave to Amend Complaint in substantially the form in which plaintiffs propose to file it. As set forth above, plaintiffs have received hundreds of consents to joinder, and more are flowing in. Plaintiffs request 30 days from the date of entry of any Order requiring joinder to file their First Amended Complaint so as to allow sufficient time for receipt of consents from the remaining PSPs. In the event the Court determines that the PSPs do not need to be joined, plaintiffs will file the First Amended Complaint set forth at Exhibit A to their motion without further delay.

Under Rule 17(a) of the Federal Rules of Civil Procedure, no action may be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for joinder or substitution of the real party in interest. In *Advanced Magnetics*, 106 F.3d 11, where attempted assignments were deemed insufficient to confer standing, the Second Circuit reversed the trial court's dismissal for lack of standing. It held that the assignors should have been allowed to substitute into the action where there was an honest mistake as to the legal effectiveness of the assignments and there would be no prejudice to the defendant, because "[t]he form of the respective contentions should not have been allowed to obscure their substance":

> The attempted assignment was a tactic meant to allow [plaintiff] to sue as [an] assignee . . . ; but assignments are not impermissible. **There plainly was a mistake as to the legal effectiveness of the documents to permit [plaintiff] to sue as assignee**. However, the [trial] court did not refer to any evidence suggesting that the mistake itself was deliberate or tactical, and we have been pointed to no evidence that would indicate that the attempted assignments were undertaken in bad faith or in an effort to deceive or prejudice the defendants. . . . [The plaintiff] and the [assignors] erred in believing that their assignment agreements had the legal effect of permitting the claims to be pursued in the name of plaintiff. . . . **it would be unjust to allow defendants to foreclose pursuit of those claims by taking advantage of that otherwise inconsequential error**. [*Id.* at 20-21 (emphasis added)]

Thus, as the Second Circuit recognized in *Advanced Magnetics,* lack of standing does not **require** dismissal where a mistake in determining the proper plaintiff was an honest and understandable one. Any "mistake as to the legal effectiveness of the assignments]" here, if one is found, clearly was an honest and understandable one and, accordingly, it would be curable under Rule 17(a). For this reason, plaintiffs submit that this Court's reliance on *Lans v. Gateway 2000, Inc.,* 84 F. Supp. 2d 112, 115 (D.D.C. 1999), *aff'd,* 252 F.3d 1320 (Fed. Cir. 2001), in refusing to

allow amendment of the complaint in *AT&T* to join the PSPs under Rule 17, was misplaced. *See* 2003 WL 1633523, at *7 n.11.[24] For in *Lans* the district court found that the error in determining who was the proper party to bring suit was **not** an honest or understandable one, and the Court of Appeals affirmed on this ground. Because the plaintiff's "personal choices occasioned his standing problems and the need to amend," and the plaintiff's "original allegations were not honest and understandable mistakes," the Court of Appeals held that, "**[u]nder these circumstances**, the district court remained well within its broad discretion in denying [plaintiff's] motion for leave to amend his complaint." 252 F.3d at 1328-29 (emphasis added).

The Second Circuit in *Advanced Magnetics*, moreover, was influenced by the fact that substitution would not result in any undue prejudice to the defendant, for "[t]he original complaint plainly gave defendants the particulars of the [assignors'] claims, and the attempt to substitute the [assignors] was made within a reasonable time." 106 F.3d at 21; *see* 6A Wright & Miller, *Federal Practice and Procedure*, § 1555, at 412-15 & n.5 (2d ed. 1990) (joinder permitted to avoid forfeiture and injustice where honest mistake was made as to real party in interest; *Scheufler v. General Host Corp.*, 126 F.3d 1261, 1269-71

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[24] This Court's reliance on *Lans* also was misplaced because any standing defect on the part of the plaintiff aggregators would be a prudential one and thus curable.

(10th Cir. 1997) (trial court properly allowed joinder of real parties in interest and relation back where joinder would not prejudice defendant); *accord Lemmon v. Board of County Commissioners of County of Brown,* No. 00-2297-CM, 2002 WL 370227, at *3 (D. Kan. Feb. 21, 2002); *Wilson v. Pope,* No. 96 C 5818, 1997 LW 403684, at *5 (N.D. Ill. July 14, 1997); *Verdi v. City of Philadelphia,* 553 F. Supp. 334, 338 (E.D. Pa. 1982); *see also Renfrew Center v. Blue Cross & Blue Shield of Central New York, Inc.,* No. 94-CV-1527, 1997 WL 204309, at *2-5 (N.D.N.Y. 1997) (where plaintiff lacked standing, substitution allowed); *Byers v. U.S.,* No. 99-791C, 2000 U.S. Claims LEXIS 266, *11-12 (Ct. Cl. 2000) (same).[25]

Joinder here similarly will not prejudice defendant, because the original and refiled complaints, and their Exhibits A through E, gave it notice of the claims sought to be asserted and the identity of the PSPs on whose behalf this action has been brought. Joinder, however, will avoid a potential forfeiture of millions of dollars of compensation for dial-around calls, since the PSPs undoubtedly will be met with an argument by defendant that a large portion of the claims sought to be asserted in this action are time-barred if the PSPs are forced to institute new actions in their own names.

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[25] Joinder is the preferred course to substitution here in order to preserve, if necessary, plaintiffs' argument that they are proper party plaintiffs and to avoid any possibility of waiver.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court grant their Motion for Leave to Amend Complaint in order to assert additional grounds for recovery under the Communications Act (attached at Ex. A to plaintiffs' Motion). Alternatively, plaintiffs respectfully request that this Court grant them leave to file their First Amended Complaint asserting additional grounds for recovery under the Communications Act and joining the PSPs as party plaintiffs within 30 days of entry of its Order (substantially in the form of the First Amended Complaint attached at Ex. B to plaintiffs' Motion).

May 22, 2003 Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	
Plaintiffs,	)	
	)	**CASE NO.:**
v.	)	**1:99 CV 696 (ESH)**
AT&T CORPORATION,	)	
Defendant.	)	

[PLAINTIFFS'] MOTION FOR RECONSIDERATION

(Filed May 23, 2003)

* * *

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	
Plaintiffs,	)	
	)	No. 1:99CV00696
v.	)	
AT&T CORPORATION,	)	
Defendant.	)	

AFFIDAVIT OF THOMAS KEANE

I, Thomas Keane, an adult of sound mind, would testify to the following from my personal knowledge if called to do so at hearing in this case:

1. That I am an officer of Jaroth, Inc., d//b/a Pacific Telemanagement Services (PTS), one of the parties to the complaint in the above captioned case. As such, I have knowledge of the foregoing facts.

2. As set forth below, Jaroth, Inc. has suffered a direct injury as a consequence of AT&T's failure to accurately track and pay dial around compensation required by Section 276 of the federal Communications Act. The injury suffered by Jaroth is directly related to pay telephones owned and operated by Jaroth during the relevant period of time, as described below, and as a partner in entities that owned and operated pay telephones during the relevant period.

3. In 1985 I began the business of installing and maintaining pay telephones in California under a sole proprietorship. The business was incorporated as Jaroth, Inc. in 1986, at which time Jaroth, Inc. began conducting business under the assumed name PayTel Phone Systems.

4. In 1991, the FCC ordered AT&T to compensate payphone service providers (PSPs) for dial around calls. Jaroth, Inc. submitted these claims to AT&T for pay telephones operated by Jaroth, Inc.

5. In 1992, Jaroth, Inc., Pacific Coin, Southern Cal Payphone, and Continental Payphone, Inc. created a partnership to provide pay telephone services to end users. This partnership was known as Communication Management Company. Beginning in 1994, Jaroth began submitting dial around compensation claims to AT&T and other interexchange carriers on behalf of the pay telephones owned and operated by Communication Management Company, as well as Jaroth, Inc., Pacific Coin, Inc. and Southern Cal Payphone.

6. In 1994, Jaroth, Inc. Jaroth, Inc. and GFA Capital, Inc. (d/b/a/ Continental Payphone created a Joint Venture called NuCom, with each corporation owning a 50% interest in NuComm. Under this arrangement, Jaroth, Inc. and GFA Capital each continued to own pay telephones, operated by NuCom. NuCom also purchased and installed an additional approximately 2000 pay telephones. In addition, NuCom began doing business as NuCom

Telemanagement. NuCom submitted dial around compensation claims to AT&T and other interexchange carriers on behalf of NuCom, Jaroth, and GFA Capital.

7. In 1996, NuCom, a Joint Venture, was dissolved, and the assets of the venture were divided between Jaroth and GFA Capital. As part of the dissolution of NuCom, Jaroth, Inc. reacquired responsibility for managing the pay telephones owned by Jaroth, and in addition acquired 50% of the newly installed pay telephones owned by NuCom.

8. In addition, Jaroth acquired 50% of the business assets related to NuCom Telemanagement, and integrated that into Jaroth, Inc., and Jaroth began doing business as Pacific Telemanagemet, (PTS). Beginning in 1997, after the dissolution of NuCom, Jaroth, Inc. owned and operated approximately 3400 payphones in the United States. In addition, Jaroth, Inc., doing business under the assumed name Pacific Telemanagement Services (PTS) provided dial around compensation billing and collection (i.e. aggregation) services on its own behalf, as well as for Pacific Coin, Inc.

9. In February 1998, Jaroth sold its pay telephone operations to Pacific Coin. As part of that transaction, Jaroth became a 16.9% partner of Pacific Coin (Southern California and other companies also became partners of Pacific Coin.) Jaroth, Inc., in addition to being a partner in Pacific Coin, separately

(and for a fee) submitted dial around compensation claims on behalf of Pacific Coin, and other companies.

10. In the First Quarter 2000, Pacific Coin was reorganized as a corporation.

11. In the first Quarter, 2002, Jaroth again began installing and operating its own pay telephones, and submitted dial around compensation claims to AT&T for Pacific, as well as its own pay telephones.

12. In June 2002, Jaroth sold its partnership interest in Pacific Coin, and ceased providing dial around compensation billing and collection services to Pacific Coin. However, since that time, it has continued to submit compensation claims to AT&T on its own behalf.

13. During the period from 1985 to February 1998, and after 1st Quarter 2002 Jaroth owned and operated pay telephones. During the period from February 1998 through 1st Quarter 2002, Jaroth owned a 16.9% partnership interest in Pacific Coin, which owned and operated pay telephones.

FURTHER THE AFFIANT SAYETH NOT.

/s/ Thomas Keane
Thomas Keane

Under penalties as provided by law, I certify that the above statements are true and correct to the best of my knowledge.

/s/ Thomas Keane
Thomas Keane

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	)	
Plaintiffs,	)	
	)	No. 1:99CV00696
v.	)	
AT&T CORPORATION,	)	
Defendant.	)	

AFFIDAVIT OF , SEAN VENEZIA

I, Sean Venezia, an adult of sound mind, would testify to the following from my personal knowledge if called to do so at hearing in this case:

1. That I am an officer of Intera Group, Inc. and its wholly-owned subsidiaries, NSC Telemanagement Corporation, n/k/a/ INTERA Communications Corporation (hereinafter "NSC Telemanagement"), one of the parties to the complaint in the above captioned case. As such, I have knowledge of the foregoing facts.

2. As set forth below, NSC Telemanagement has suffered a direct injury as a consequence of AT&T's failure to accurately track and pay dial around compensation required by Section 276 of the federal Communications Act. The injury suffered by NSC Telemanagement is directly related to compensation that is due to NSC Telemanagement from AT&T.

3. NSC Telemanagement is a wholly owned subsidiary of Intra Group, Inc. NSC Communications

Public Services Corporation is a separate, parallel wholly owned subsidiary of Intera Group, Inc. NSC Telemanagement provides dial around compensation services to PSPs, including its affiliated company NSC Communications Public Services Corporation. For these services, NSC Telemanagement billed carriers such as AT&T for calls made from NSC Communications Public Services Corporation's payphones either directly or through contractual agreements with third-parties.

4. NSC Telemanagement has performed dial-around compensation processing for NSC Communications Public Services Corporation since July 1, 1998. NSC Telemanagement submits, on a quarterly basis, on behalf of NSC Communications Public Services Corporation, a list of pay telephone numbers ("ANIs") that are in operation. NSC Telemanagement ensures that such list of ANIs is submitted to AT&T for compensation.

5. Occasionally, AT&T "disputes" an ANI for which compensation is owed. When an ANI is disputed, AT&T withholds payment until the "dispute" is resolved.

6. NSC Communications Public Services Corporation does not deal directly with AT&T (or its agent) to resolve these disputes. All such dealings occur through NSC Telemanagement.

7. Disputes as to whether such ANIs are compensable are resolved by NSC Telemanagement.

8. By agreement between NSC Telemanagement and NSC Communications Public Services Corporation, NSC Telemanagement receives 10% of the compensation paid by AT&T on disputed ANIs that are resolved by NSC Telemanagement. (Attached Exh. A, p. 3, Section 7.)

9. NSC Telemanagement has suffered an injury in fact on the ANIs that have been improperly disputed by AT&T, and which AT&T has refused to pay compensation on.

FURTHER THE AFFIANT SAYETH NOT.

/s/ M. Sean Venezia
M. Sean Venezia

Under penalties as provided by law, I certify that the above statements are true and correct to the best of my knowledge.

/s/ M. Sean Venezia
M. Sean Venezia

PETITIONER'S BRIEF

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(7)

No. 07-552

In The

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P. & AT&T CORP.,
Petitioners,

v.

APCC SERVICES, INC. ET AL., *Respondents*

On Writ Of Certiorari to the United States Court of Appeals
For the District of Columbia Circuit

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QUESTION PRESENTED

Whether the assignment of a claim "for purposes of collection" confers standing on an assignee that has no personal stake in the case and that avowedly litigates only "on behalf of" the assignors.

PARTIES TO THE PROCEEDING

Petitioners are Sprint Communications Company L.P. and AT&T Corp.

Respondents are APCC Services, Inc.; Data Net Systems, L.L.C.; Davel Communications Group, Inc.; Jaroth, Inc., d/b/a/ Pacific Telemanagement Service; NSC Telemanagement Corp., n/k/a Intera Communications Corporation; and Peoples Telephone Co.

RULE 29.6 DISCLOSURES

The shares of petitioner AT&T Corp. ("AT&T") are 100-percent owned by AT&T, Inc. AT&T, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Petitioner Sprint Communications Company L.P. ("Sprint") is a wholly owned subsidiary of Sprint Nextel Corporation. Sprint Nextel Corporation has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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No. 07-552

In The

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P. & AT&T CORP.,

Petitioners,

v.

APCC SERVICES, INC. ET AL., *Respondents.*

On Writ Of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The district court's initial order granting petitioners' motion to dismiss (J.A. 295-313) is reported at 254 F. Supp. 2d 135. The district court's subsequent order on reconsideration denying petitioners' motion to dismiss (Pet. App. 83-105) is reported at 281 F. Supp. 2d 41. The district court's orders denying petitioners' motions for reconsideration and certifying the cases for interlocutory appeal (Pet. App. 45-63 and 64-82) are reported at 297 F. Supp. 2d 90 and 297 F. Supp. 2d 101. The court of appeals' initial opinion holding that respondents have standing to sue but no right of action (Pet. App. 4-41) is reported at 418 F.3d 1238. This Court's order vacating the court of appeals' ruling and remanding is reported at 127 S. Ct. 2094. The court of appeals' subsequent decision (Pet.

App. 1-3) remanding the case to the district court is reported at 489 F.3d 1249.

JURISDICTION

The court of appeals entered its judgment on June 8, 2007. The court of appeals denied petitioners' timely request for rehearing on August 7, 2007. Pet. App. 111-112. The petition for a writ of certiorari was filed on October 25, 2007 and granted on January 4, 2008. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, of the United States Constitution provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Under Article III of the Constitution, federal court litigation generally may be instituted only by parties that are seeking to protect their own interests. *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975). This bedrock rule requires a plaintiff to demonstrate that it has its own "personal stake in the outcome" of the litigation. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Similarly, a plaintiff lacks Article III standing if it does not stand to gain or lose anything itself from a federal court judgment. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Accordingly, a plaintiff may bring an action to vindicate the interests of third parties only in narrow circumstances that guarantee concrete adverseness and that assure that the litigation will protect the legitimate interests of both those third parties and the defendants. Fed. R. Civ. P. 23; *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

In this case, the court of appeals has adopted an unprecedented and sweeping exception to this basic framework of Article III standing. Under its holding, a nominal plaintiff that has suffered no injuries itself and that will not share in any recovery in the lawsuit has Article III standing to maintain an action in its own name on behalf of thousands of individuals who do not participate in the suit as parties, and who were perfectly capable of bringing suit in their own names. This holding will allow large numbers of damages claims to be brought in collective actions that lack the protections of either Federal Rule of Civil Procedure 23 or the doctrine of associational standing. This novel form of group litigation cannot

be squared with this Court's Article III and prudential standing rulings over the past four decades. Accordingly, the decision below should be reversed.

1. Regulations issued by the Federal Communications Commission (FCC) pursuant to the Federal Communications Act require long-distance telephone companies to compensate payphone operators for "dial around" long-distance calls. See 47 C.F.R. 64.1300(d). In a dial around call, a customer uses a payphone to access, through a toll-free number or access code, a less expensive long-distance service than the payphone operator uses for calls initiated from that phone. See generally *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1518 (2007). In *Global Crossing*, a payphone operator sued a long-distance company for failure to provide dial-around compensation in accordance with the FCC's regulations. This Court held that payphone operators can enforce their right to dial-around compensation through a cause of action for damages under Sections 201(b) and 207 of the Communications Act. *Id.* at 1520-21, 1525.

2. This lawsuit is one of many actions brought around the nation (see Pet. App. 71 & n.9) seeking dial-around compensation allegedly owed by long-distance companies to payphone operators. Some suits were brought by the operators themselves. See, *e.g.*, *Global Crossing*, *supra*. By contrast, with only a single exception, this case was brought by "aggregators." Pet. App. 7.[1] Aggregators do not themselves

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[1] All of the claims of the payphone operators against petitioner Sprint are being litigated by aggregators. More than 99% of the payphone operators' claims against petitioner AT&T are

own and operate payphones. Instead, they are intermediaries that the operators have hired to collect and distribute the dial around fees paid by long-distance companies to numerous individual operators; this "aggregation" of the claims is said to provide efficiencies in billing and collection to the carriers and the operators. *Id.*

In this case, approximately 1400 payphone operators appointed the aggregators not merely to collect and distribute the dial around payments made by petitioner long-distance companies Sprint and AT&T, but actually to litigate their disputes with petitioners over the amount of compensation that is owed. The documents governing the relationship between the payphone operators and the aggregators explain that, as with the collection of dial-around compensation allegedly owed to the operators, "the parties recognize the efficiencies of [aggregators] taking collective action on behalf of [the payphone operators]" in litigation against long-distance companies. Pet. App. 117. The operators accordingly assigned their dial around claims against petitioners to the aggregators "for

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being litigated by aggregators. One payphone operator, Peoples Telephone Company, is a named plaintiff suing on its own behalf in the AT&T case. Pet. App. 8. Petitioners do not dispute the standing of that entity to assert its own dial-around compensation claim under the FCC regulations. Petitioners challenge the standing of all the aggregators, including the two that assert an ownership interest in individual, non-party payphone operators. *Id.* at 10 n. **.

At the time of the court of appeals' decision, Peoples Telephone Company was the only plaintiff that allegedly owned and operated payphones. In September 2007, respondents amended their complaint and now allege that a few aggregators own and operate payphones.

purposes of collection." *Id.* at 7-8. The assignments bind the aggregators to litigate "on behalf of" the payphone operators and to "pass back to the [payphone operators] any amounts they recovered thereby." *Id.* at 7-8, 114-115. The operators agreed to finance all the costs of the litigation through deductions from ongoing payments collected by the aggregators from petitioners. *Id.* at 126.

Like an ordinary agent or attorney, the aggregators stand to gain or lose nothing from the lawsuit, no matter how it is resolved. Under the assignments, all the proceeds from a judgment (if any) against petitioners go to the payphone operators. Pet. App. 7, 9-10. If the case is settled, each payphone operator "will receive dial-around compensation settlements on a per call basis." *Id.* at 124-125. Likewise, "should legal fees and expenses also be awarded, they will be returned to" the payphone operators. *Id.* at 124-125; see also *id.* at 120.

The assignments further delineate the scope of the aggregators' authority to conduct the litigation. The aggregator is designated the payphone operators' "attorney in fact" and "exclusive agent" to litigate or enter into settlements not in the aggregator's own interests but instead "on behalf of" the payphone operators. Pet. App. 8, 115, 117. In that capacity, the aggregator may take "such action as it deems reasonably necessary and appropriate." *Id.* at 117; see also *id.* (settlement authorized if within "reasonable exercise of [aggregator's] discretion"). If the aggregators fail to follow those directives, however, the operators purport not to be bound by the settlement or judgment in the litigation. *Id.* at 115; *id.* at 118 (pay-

phone operators bound by "reasonable determinations").

Under the assignments, the aggregators will "prosecute the litigation on [the operators'] behalf." Pet. App. 127. But the assignments further state that, "[i]f at any point [the aggregator] is no longer representing [the operator] in the litigation, [the operator] will be able to pursue [its] claims on [its] own, should [it] so choose." *Id.* More specifically, if an operator ceases to authorize the designated surcharge for litigation expenses "or withdraws his/her agreement to allow these deductions [to finance the litigation] prior to conclusion of the suits, [the aggregator] will drop that [service provider] from the plaintiff's list and will have no obligation to represent the [service provider] in the collection of these claims." *Id.* at 126.

3. Invoking these assignments, the respondent-aggregators filed this suit in the aggregators' own names against petitioners. J.A. 26-27, 29-31. As noted, the aggregators do not own payphones, are not themselves owed dial-around compensation under the FCC regulations, and do not stand to gain or lose anything from their suit. The complaint instead explains that the aggregators are suing "on behalf of hundreds of entities that own and operate over 400,000 public payphones located throughout the United States." J.A. 27-28. The complaint does not allege that the aggregators themselves have suffered any injuries, it merely alleges that "independent payphone service providers have been damaged" by the petitioners' failure to pay dial-around compensation. J.A. 41, 46. The complaint further requests the pay-

ment of damages to respondents "as the billing and collection agent for compensation" for the payphone operators. J.A. 47.[2]

Petitioners asserted counterclaims seeking, *inter alia*, moneys owed to them by the payphone operators. But because the operators are not parties to the suit, petitioners could only name the aggregators (rather than the payphone operators) as counterclaim defendants. See Defendant's Answ. and Counterclaims, *APCC Servs., Inc., et al. v. AT&T Corp.*, No. 1:99-cv-696 (ESH) (filed Mar. 23, 2000). Petitioners also sought discovery with respect to the nature and scope of the claims to dial-around compensation underlying the suit, as well as respondents' relationship to the payphone operators and respondents' interest in the outcome of the suit. Respondents took the position that the operators themselves were immune from party discovery because they were not participating in the suit. Plaintiffs' Response to AT&T's Motion to Compel at 8-9, *APCC Servs., Inc., et al. v. AT&T Corp.*, No. 1:99-cv-696 (ESH) (filed July 8, 2008). When discovery revealed all of the details of the assignment from the operators to respondents, petitioners moved to dismiss the case for lack of standing.

4. The district court initially dismissed the AT&T case, J.A. 295-313, reasoning that respondents lacked Article III standing because the "assignments on which plaintiffs rely for standing do not shift the loss suffered by the [payphone operators] to the aggrega-

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[2] Citations to the Complaint refer to the Complaint filed against petitioner AT&T. The Complaint filed against petitioner Sprint was identical in all material respects.

tors that represent them." J.A. 302. The court further noted that the plaintiffs did not provide any consideration to the payphone operators in exchange for the assignments. *Id.* In addition, the assignments "grant only the right to sue and not a right to a remedy," which the court concluded was insufficient to confer standing, because respondents "do not have a concrete private interest in the outcome of this suit." J.A. 302, 305. "[T]he outcome of the suit," the court elaborated, "will not affect [respondents] in a personal and individual way * * * since, unlike a typical assignment, none of the remedies sought will flow to [them] as assignees." J.A. 305.

Respondents sought reconsideration of the district court's initial standing ruling. In the event their reconsideration motion was denied, respondents moved to add the payphone operators as individual party plaintiffs or in the alternative to proceed as a class action with a payphone operator as the class representative. See J.A. 314-368; Aggregators' Motion for Leave to Amend, *APCC Servs., Inc., et al. v. AT&T Corp.*, No. 1:99-cv-696 (ESH) (filed May 23, 2003). The district court granted respondents' motion for reconsideration, holding that the aggregators have standing, and denied as moot respondents' motions to interpose payphone operators as the party plaintiffs. Pet. App. 83-106. The court reasoned that, although the "assignments do not give [the aggregators] the right to retain or share in any proceeds of the litigation," Article III was nevertheless satisfied because "the assignment transfers legal title to the claim," rather than "merely transfer[ing] a power of attorney." *Id.* at 94. In the court's view, it was dispositive

that the assignments "purport to transfer *ownership* of the [payphone operators'] right to collect," without regard to whether the transfer authorized the aggregators to keep any of the proceeds. *Id.* at 94.

The district court separately ruled that the payphone operators have a private right of action to enforce the FCC's regulations. Pet. App. 46, 65; see *APCC Servs., Inc. v. Cable & Wireless, Inc.*, 281 F. Supp. 2d 52 (D.D.C. 2003). The district court certified its standing and right of action rulings for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 63, 81.

5. The court of appeals granted the petitions for interlocutory appeal, Pet. App. 43, and affirmed in part and reversed in part, *id.* at 4-41.

a. A sharply divided court first affirmed the district court's holding that respondents have Article III standing. The majority reasoned that the assignment was valid and was not "anything less than a complete transfer to the aggregator of the [payphone operators'] dial-around compensation claim." Pet. App. 12. The majority recognized that any proceeds of the suit would go to the payphone operators, but construed that fact as "a mere reflection of the aggregator's promise to pass back to the [operator] whatever it is able to collect." *Id.*

The majority then concluded that an assignee has standing even though it "will reap no direct benefit from the suit." Pet. App. 13. The majority deemed it sufficient as a matter of law that the assignments "transfer to the assignees the entire interest of the [operators] in their dial-around compensation claims." *Id.* at 14. In so holding, the majority relied

on Federal Rule of Civil Procedure 17(a), under which an assignee's status as a "real party in interest" is generally unaffected by the assignee's obligation to "account for the proceeds of a suit brought on the claim." Pet. App. 15. The majority said that it could identify "no basis for distinguishing the personal stake required under Rule 17(a) from the interest required for standing." *Id.* at 16.

Judge Sentelle dissented from the majority's holding that respondents have standing. Pet. App. 28-35. He stressed that the payphone operators, not respondents, are the only entities "with a real stake in the outcome of the controversy." *Id.* at 29. Judge Sentelle found the majority's reliance on the assignment to be misplaced because "[t]he doctrine of assignee standing does not wholly erase the basic requirements of standing." *Id.* "Only an assignment that gives the assignee an actual interest in the recovery is sufficient for standing." *Id.*; see also *id.* ("The assignee standing doctrine recognized by the Supreme Court * * * clearly refers to an actual assignment of an interest that secures a portion of the recovery."). Aggregators, Judge Sentelle reasoned, have no such interest because they "are a pass-through entity," *id.* at 32, "merely act[ing] as the [payphone operators'] exclusive *agent for billing and collection*," *id.* at 33 (emphasis in original). See *id.* (respondents "ha[ve] no actual financial interest in the recovery"). In his view, "[w]here the 'assignment' relationship is in substance a mere 'agency' relationship such that the 'assignee' enjoys no right to keep a part of the recovery, the irreducible constitutional minimum of standing is left unsatisfied." *Id.* at 31-32.

b. The court of appeals separately ruled (over then-Chief Judge Ginsburg's dissent) that payphone operators do not have a private right of action to enforce the FCC's dial-around compensation regulations, and it therefore ordered the dismissal of the aggregators' suit on behalf of the operators. Pet. App. 16-28, 35-41.

6. Respondents filed a petition for a writ of certiorari. This Court granted the petition, vacated the court of appeals' judgment dismissing the action, and remanded for reconsideration in light of *Global Crossing*. *APCC Servs, Inc. v. Sprint Commc'ns Co.*, 127 S. Ct. 2094 (2007).

On remand, the court of appeals held that, in light of *Global Crossing*, respondents have a private right of action to enforce the FCC's dial-around compensation regulations. Pet. App. 1-3. Noting that the court had separately upheld respondents' standing to sue on the operators' behalf to enforce those regulations, *id.* at 2, the court of appeals remanded the case to the district court for further proceedings, *id.* at 3. This Court granted certiorari to review the court of appeals' holding that the respondent-aggregators have standing to bring this suit. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 830 (2008).

SUMMARY OF THE ARGUMENT

The court of appeals' holding that aggregators have standing to sue conflicts with foundational principles of Article III and prudential standing.

1. Article III confines the federal judicial power to the adjudication of "cases" and "controversies," and the requirement that the plaintiff possess "standing" enforces that command. To establish standing, the

plaintiff must both (i) have personally suffered an injury, and (ii) demonstrate that the injury will be redressed through the litigation. Respondents cannot satisfy either requirement.

Respondents have not suffered any injury of their own – they are not payphone operators whom the FCC regulations protect and have no independent legal claim against petitioners. Respondents instead invoke the doctrine that an assignee has standing in some cases to assert the injury in fact suffered by the assignor. But respondents were assigned nothing more than a "right" to serve as a collection agent for the operators, unaccompanied by any independent right to recovery. Such assignments "for collection" only do not confer an "injury" for Article III purposes, much less an injury that will be redressed by their complaint.

First, assignments that are solely for purposes of collection do not transfer the assignors' putative injuries. Any assertion that respondents have incurred a personal harm that they seek to vindicate in this litigation is belied by the fact that they are avowedly litigating "on behalf of" the payphone operators, as the operators' "agents." The operators, in turn, claim the right not to be bound to the outcome of the suit if respondents deviate from their circumscribed authority. Respondents' only practical interest in the outcome of this suit is their desire to see their clients compensated, a "psychological consequence" that makes respondents little more than "concerned bystanders." That falls far short of the mark for an Article III injury-in-fact. *Valley Forge Christian College*

v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 485 (1982).

Second, even if the assignments enabled the respondents to assert injuries incurred by the operators, those injuries could not be redressed through this litigation because respondents have no stake in the outcome of this case and thus cannot "benefit in a tangible way" from the judgment in this suit. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998). Respondents were assigned a right to sue on behalf of payphone operators, but were not assigned a personal right to or interest in the recovery, which remains entirely in the hands of the payphone operators. Win or lose, respondents' own interests are unaffected by the outcome of the litigation, and even a court judgment in their favor cannot afford them any redress.

Third, the court of appeals' holding that a nominal transfer of legal "title" is sufficient elevates form over substance, contrary to this Court's precedent, which demands redressability in fact as much as injury in fact. Moreover, even assuming that title passed to some extent, what is dispositive here for Article III purposes is that the legal right to the proceeds – the question to which the constitutional redressability inquiry is directed – was left in the hands of the operators. Time and again, this Court has held that standing is not "a kind of gaming device" (*ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion of Kennedy, J.)), but instead must be judged by the realities of the plaintiff's interest in the suit. Parties cannot contract themselves out of Article III's requirements.

Finally, the frailty of respondents' claim to Article III standing is evidenced by the fact that the only authority they can cite for their position is two decisions that not only predate the advent of this Court's modern Article III jurisprudence, see *Titus v. Wallick*, 306 U.S. 282 (1939); *Spiller v. Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117 (1920), but also had nothing to do with standing. Those decisions addressed only the validity of the assignments held by the plaintiff, not whether the plaintiff satisfied constitutional standing requirements. Respondents' reliance on Federal Rule of Civil Procedure 17 fares no better. That provision is concerned with identifying real parties in interest, not with establishing standing. In any event, a rule of procedure cannot change the foundational command of Article III.

2. Even if the assignments conferred Article III standing on respondents, their attempt to pursue damages claims on behalf of 1400 absent third party PSPs violates the doctrine of prudential standing and its "judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). "In the ordinary case, a party is denied [prudential] standing to assert the rights of third persons." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977). As this Court has long held, this general rule applies where, as here, the absent third parties are fully capable of bringing claims in their own names and where, as here, the putative plaintiff is seeking to maintain claims that require "individualized proof" of the injuries suffered by the absent third parties. *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).

To permit federal courts to adjudicate claims in such circumstances creates unacceptable risks that the litigation will be neither fair nor final.

The judgment accordingly should be reversed.

ARGUMENT

Article III of the Constitution confines the judicial power to the resolution of actual "Cases" and "Controversies." U.S. Const. art. III, § 2. That limitation is an indispensable "ingredient of [the] separation and equilibration of powers, restraining the courts from acting at certain times," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), and "confin[ing] federal courts to a role consistent with a system of separated powers," *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). As this Court has reconfirmed in each of its last two Terms, "[n]o principle is more fundamental to the judiciary's proper role in our federal system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006) (brackets in original) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)); see *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2562 (2007) (plurality) (same); *id.* at 2583 (Scalia, Thomas, JJ., concurring in the judgment).

An "essential and unchanging" component of the case-or-controversy requirement is that a plaintiff invoking the jurisdiction of the federal courts must have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). That doctrine confines the judiciary's role to the resolution of disputes "of the sort

traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. If a party lacks standing — and thus if the case "is not a proper case or controversy" — the federal "courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 126 S. Ct. at 1860-1861.

Respondents' theory is that the assignments from the payphone operators give them Article III standing, even though under the assignments they stand to win or lose nothing themselves no matter what happens in the lawsuit. That theory has no moorings in this Court's precedent. This Court repeatedly has held that Article III requires a plaintiff to demonstrate that it has a direct, personal stake in the outcome of the litigation. Respondents have no such interest here. Because the assignments bind respondents to remit to the payphone operators any and all sums collected in the litigation down to the last penny, the respondents will not personally benefit in any tangible way from a judgment in their favor.

I. RESPONDENTS LACK ARTICLE III STANDING BECAUSE THEY HAVE NO PERSONAL STAKE IN THE LITIGATION

The "irreducible constitutional minimum of standing" requires that the plaintiff (1) "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized"; (2) identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly * * * trace[able] to the challenged action of the defendant"; and (3) show that it is "likely, as opposed to merely

speculative, that [its] injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-561 (internal quotation marks and citation omitted). Standing must exist at every stage of the litigation, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997), and the party invoking the jurisdiction of the federal courts bears the burden of demonstrating its standing, *Lujan*, 504 U.S. at 561. See also *Warth*, 422 U.S. at 518. Meeting that burden is "substantially more difficult" when, as here, the plaintiff complains not about the defendant's violation of his own rights, but of the rights of "someone else." *Lujan*, 504 U.S. at 562.

Respondents cannot meet that burden. Respondents have suffered no injury of their own, and the assignments they hold "for collection" do not suffice to transfer the payphone operators' injuries. But in any event, any injury that could be said to have been transferred to respondents cannot be redressed through this litigation, in which they have no stake in the outcome. We first take up the failure of respondents to satisfy the redressability prong of this Court's test for Article III standing, and then turn to their failure to satisfy the injury-in-fact prong.

A. This Suit Presents No Case Or Controversy Because The Aggregator-Plaintiffs Have Not Suffered A Redressable Injury

1. Article III Requires That The Plaintiff Have A Direct, Personal Stake In The Outcome Of Its Own Case That Can Be Redressed By A Judgment In Its Favor.

Although this Court "has packaged the requirements of a constitutional 'case' or 'controversy' some-

what differently," one central requirement has remained constant over the years: "The plaintiff personally [must] benefit in a tangible way from the court's intervention." *Steel Co.*, 523 U.S. at 103 n.5; see *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (same). An interest in litigating a suit is not enough; otherwise every lawyer would have standing to litigate claims in his own name whenever a client had retained him to pursue those claims. Instead, the plaintiff must have a "'concrete private interest in the outcome of [the] suit,'" *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (quoting *Lujan*, 504 U.S. at 573), and must seek relief that "directly and tangibly benefits him," *Lance v. Coffman*, 127 S. Ct. 1194, 1196 (2007) (per curiam). See *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part & concurring in the judgment) (standing requirements assure "that the parties before the court have an actual, as opposed to professed, stake in the outcome"); see also *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982) (Article III requires a plaintiff to show that a judicial decision "will relieve a discrete injury to himself"). The requirement that the plaintiff have a "personal stake in the outcome of the controversy" ensures that there is "concrete adverseness" between the parties, thereby "sharpening the presentation of issues upon which the court so largely depends for illumination." *Baker*, 369 U.S. at 204; see *United States v. Richardson*, 418 U.S. 166, 179 (1974) ("claimant must have a personal stake in the outcome") (internal quotation marks omitted).

Applying that core principle, this Court has held time and again that plaintiffs who cannot personally benefit from the judgment they seek lack Article III standing. In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), for example, the Court held that indigents lacked standing to challenge the Secretary of the Treasury's grant of favorable tax treatment to hospitals that had withheld medical services from the poor. There was no dispute (for purposes of the standing decision) that the hospitals' non-profit tax status required the provision of some medical services to indigents or that the indigents had been denied needed medical services based on their inability to pay. *Id.* at 32-33. The plaintiffs thus had suffered an Article III injury and had a legal claim to assert. *Id.* at 40-41.

But Article III required more. This Court held that the plaintiffs in *Simon* lacked Article III standing because the relief they requested – a judgment invalidating the Secretary of the Treasury's grant of non-profit tax treatment to the hospitals – would not provide any redress running to the plaintiffs themselves. Instead, the requested judgment would only adjust the relationship between the defendant and third parties not before the court. *Simon*, 426 U.S. at 42-43. The plaintiffs themselves did not "stand to profit in some personal interest," *id.* at 39, and, indeed, it was "speculative" whether the judgment would result in the provision of hospital services to the plaintiffs, rather than a hospital's decision to forgo favorable tax treatment, *id.* at 42-43. The plaintiffs accordingly had failed to "allege[] such a personal stake in the outcome of the controversy as to

warrant [*their*] invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on [*their*] behalf." *Id.* at 38 (second emphasis added); see *Baker*, 369 U.S. at 204 (same). Because there was "no substantial likelihood that victory in this suit would result in respondents[] receiving the [relief] they desire," *id.* at 45-46, any exercise of federal court jurisdiction "would be gratuitous and thus inconsistent with the Art. III limitation," *id.* at 38.

Similarly, in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), the plaintiff had suffered a legal injury from the failure of her child's father to pay child support. But that did not invest her with Article III standing to seek an order requiring the enforcement of criminal sanctions against the father because that relief would not run to the plaintiff herself. The plaintiff "no doubt suffered an injury," but "the bare existence of an abstract injury meets only the first half of the standing requirement." *Id.* at 618. Because the redress that she sought – the jailing of the child's father – would not result in the payment of any child support or otherwise be of any personal benefit to the plaintiff, she lacked Article III standing. *Id.*; see *id.* at 619 ("[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."); see also *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

2. The Payphone Operators' Assignment Of Their Claims To Respondents Does Not Confer A Right That Can Be Redressed To The Personal Benefit Of Respondents.

The court of appeals reasoned that respondents have Article III standing because the payphone operators have nominally assigned to respondents all right, title, and interest in their claims against petitioners. But that is not enough under this Court's Article III precedent.

To begin with, the court of appeals just assumed, without any discussion, that the assignments constitute a valid transfer of legal title to the payphone operators' claims. That is a state law question, and the court of appeals offered no explanation for its apparent assumption that the assignments effectively transferred legal title to the operators' claims. More fundamentally, even if the assignments were valid and complete under state law, Article III's redressability requirement cannot be altered by state law.

If the assignments had genuinely given respondents the full legal right and title to *both the claim and the recovery*, so that the damages (if any) paid in the case would legally belong to respondents to dispose of as they see fit, then the respondents likely would have Article III standing. Assignments of that type are common in, for example, the insurance industry and governmental benefit programs, where the assignee provides benefits in exchange for the assigned right to obtain reimbursement from third parties who may be liable to the beneficiary. See, *e.g.*, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126

S. Ct. 2121, 2128 n.1 (2006); *Blessing v. Freestone*, 520 U.S. 329, 334 (1997). Such assignments convey to the assignee the full chose in action – the legal right to the recovery as well as to prosecute the claim – and thereby give the assignee an injury in fact and a personal stake in the outcome of the case that can be redressed. See, *e.g.*, *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 393 (1938) (Article III jurisdiction extends to action by State on bonds where the State "was the absolute owner of the bonds and was prosecuting the claim upon its own behalf").

But as Judge Sentelle explained in his dissent below, "there are 'assignments,' and then there are assignments." Pet. App. 29. The central flaw in the majority's theory is its failure to recognize that the assignment "for collection" in this case does not in fact or in law give rise to a right that can be redressed by a court decision in respondents' favor. Even if respondents were to prevail, they stand to gain absolutely nothing – not one cent – from the judgment. It is the payphone operators, and not the respondents, who would reap the proceeds of any favorable ruling because the assignments require respondents to remit to the operators any sums collected in the litigation. Pet. App. 12, 117, 126-127. The payphone operators thus have a personal stake in the outcome of the litigation, but respondents do not. [3]

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[3] Unlike ordinary collection agents, respondents have no right to a bounty or share in the recovery under the assignments. See, *e.g.*, *State ex rel. Frieson v. Isner*, 168 W. Va. 758, 772 (W. Va. 1981); 15a Am. Jur. 2d Collection & Credit Agencies § 11 (2007).

Respondents cannot overcome that glaring redressability problem. They principally contend that under Article III, "the *assignor's* injury in fact is what matters," BIO 5, relying on this Court's statement in *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000), that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor." But that is only half of the standing requirement. Respondents ignore that Article III standing requires redressability as well as injury in fact. That an assignee may have the legal right to assert a once-removed injury suffered by another party cannot bestow Article III standing on the assignee if the court's judgment would not vindicate any personal interest of the assignee itself.

At bottom, respondents' contention fundamentally misapprehends this Court's redressability analysis in *Vermont Agency*. That case addressed the Article III standing of *qui tam* relators under the False Claims Act ("FCA"). The FCA guarantees *qui tam* relators a "bounty" – a share of the proceeds of a successful suit they bring on behalf of the United States. The Court stressed at the outset that the Article III "judicial power exists only to redress or otherwise to protect against injury *to the complaining party*," 529 U.S. at 771 (quoting *Warth*, 422 U.S. at 499). The Court then held that the bounty the *qui tam* relator receives if the suit is successful gives the relator the "concrete private interest in the outcome of the suit," *id.* (quoting *Lujan*, 504 U.S. at 573), required for Article III standing. The bounty – that is, the opportunity for personal redress by the court's judgment – alone does not give *qui tam* relators Article III stand-

ing. But the Court held that the opportunity for redress (the bounty) combined with the "partial assignment of the Government's damages claim," which gives the *qui tam* relator an "injury in fact" to assert, taken together "suffice[] to confer standing" on *qui tam* relators. *Id.* at 773-774. Both elements – redressability through the bounty and injury in fact through the assignment – were critical to the Court's opinion. That is underscored by the Court's reliance on historic practice, in every instance of which the assignee and relator plaintiffs had not only the right to assert an injury to a third party, but also their own discrete and independent stake in the outcome of the case. See *Vermont Agency*, 529 U.S. at 773-778; see also Pet. App. 31 (Sentelle, J., dissenting). Reinforcing the significance of the bounty, the Court explained that the assigned injury provided the basis for the relator not to sue just to recover money for the United States, but also "for his bounty." *Vermont Agency*, 529 U.S. at 773.

By contrast, in *Steel Co.*, this Court held that a party lacked standing where the monetary relief it sought was not "payable to respondent," but would instead be paid to a third party – the federal Treasury, 523 U.S. at 106. In so holding, the Court expressly rejected the argument that proof of a direct injury is sufficient to establish standing. "If that were so," the Court explained, "the redressability requirement would be entirely superfluous." *Id.* at 106 n.7. The Court accordingly held that proof of an Article III injury accompanied only by a request for relief that would be "worthless to *respondent*" or that would

be paid to a third party did not establish Article III standing. *Id.* (emphasis added).[4]

Resting Article III standing on the assignment of a claim to litigate that has been unhinged from any right to redress flies in the face of that precedent. If the legal validity of the assignment of a claim to litigate were all that Article III required (see Pet. App. 12), then this Court in *Vermont Agency* would have had no reason to discuss the *qui tam* relator's bounty at all, let alone to explain that the bounty satisfied *Lujan*'s requirement of a "concrete private interest in the outcome of [the] suit," *Vermont Agency*, 529 U.S. at 772. And, if an Article III injury to assert (assigned or not) were sufficient to provide standing to obtain relief that runs only to third parties, then this Court would have granted Citizens for a Better Environment standing to obtain penalties payable to the United States Treasury, see *Steel Co.*, *supra*. But the redressability requirement is not "superfluous." *Steel Co.*, 523 U.S. at 106 n.7. Thus respondents, who "cannot benefit in a tangible way from the court's intervention," *id.* at 103 n.5, lack Article III standing.

3. Litigants May Not Contract Themselves Out Of Article III's Standing Requirements.

The court of appeals suggested alternatively that respondents have standing because the assignments nominally encompass not merely the payphone op-

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[4] Cf. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 187 (2000) (civil penalties satisfy the redressability requirement only where it is "likely" that they "would redress [the plaintiff's] injuries by abating current violations and preventing future ones").

erators' claims, but also their right to recover the judgment. The court of appeals viewed the operators' undisputed right to all the proceeds of the suit as merely reflecting a distinct contractual promise by the aggregators – supposedly irrelevant for Article III purposes – to pay over to the operators any judgment or settlement. Pet. App. 12, 16. That notion was wrong both factually and legally. As a factual matter, the operators have always possessed the contractual right to the proceeds. As a legal matter, Article III is concerned with the practical reality of the parties' rights and obligations, and thus parties cannot evade the Constitution's bedrock requirement of a case or controversy through artful contractual arrangements.

First, there was no separate promise concerning return of the proceeds in this case. There is only one assignment, and it contains interlocking promises, not distinct ones. This assignment purposefully decoupled the right to bring suit on the payphone operators' claims, which was assigned to the aggregators (albeit with significant constraints), from the legal right to the recovery on those claims, which remains with the payphone operators. Any compensation recovered in the litigation belongs solely and completely to the payphone operators. See Pet. App. 12 (noting the aggregators' "promise to pass back to the [service provider] whatever it is able to collect"); *id.* at 117 ("exclusive agent for collection"); *id.* at 118-119 (respondents agree to pay any settlement proceeds to payphone operators). Under the assignment and accompanying agreements, see Pet. App. 114-

127, aggregators (unlike *qui tam* relators) may not retain a penny for themselves.

But even if the court of appeals were right that the assignment could be read to encompass two distinct promises – the operators' assignment of the right to their remedy and the aggregators' agreement to pay back the proceeds – that contractual arrangement would not change the Article III analysis. In a long line of cases, this Court has refused to ignore reality and, instead, has looked behind a plaintiff's formal legal status or title to determine whether the plaintiff has the type of genuine stake in the litigation that would support federal jurisdiction. The standing doctrine, after all, "is not a kind of gaming device that can be surmounted merely by aggregating the allegations of different kinds of plaintiffs." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion of Kennedy, J.). Quite the contrary, "when the inquiry involves the jurisdiction of a federal court, the presumption in every stage of a cause [is] that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record." *Miller & Lux v. East Side Canal & Irrigation Co.*, 211 U.S. 293, 302 (1908).

Beginning well over a century ago, this Court held that other jurisdictional limitations imposed by the Constitution cannot be circumvented by assignments that give the assignee no genuine stake in the outcome of the case. In *Woodside v. Beckham*, 216 U.S. 117 (1910), this Court held that the assignment of thirty claims to a single individual to prosecute against a mining company did not confer jurisdiction on the federal courts. The Court noted that the

plaintiff had no personal stake in the litigation, since his own claim against the company had previously been resolved in separate litigation. *Id.* at 119-120. Moreover, similar to the case at hand, the assignments were made "for the sole purpose of beginning suit in [the plaintiff's] name and to thus save expenses." *Id.* at 120. The plaintiff himself "had no interest in any of said claims or judgments" and the "actual ownership" of any proceeds from a judgment "belong to the several assignors, and [the plaintiff was] to account to them and to pay them such proceeds in case [he] collect[ed] them." *Id.* This Court held that diversity jurisdiction was lacking because the plaintiff was "not in fact the owner of the claims sued upon." *Id.*; see also *Waite v. Santa Cruz*, 184 U.S. 302, 328-329 (1902) (where plaintiff holds bonds in suit "for collection only, the circuit court was without jurisdiction," where the real individual owners' claims would not satisfy the amount in controversy requirement).

This theme is echoed in *New Hampshire v. Louisiana*, 108 U.S. 76 (1883). In that case, citizens of New Hampshire and New York assigned to their respective state attorneys general bonds from Louisiana. *Id.* at 77, 79. In *New Hampshire*, as here, the assignment was expressly "for the collection of said claim" and "for the recovery of the money due upon such claim," and the attorney general had the authority to take all steps necessary to bring suit and to carry any resulting judgment into effect. 108 U.S. at 78, 79. And, as here (Pet. App. 119-120, 126), the assignors agreed to pay the costs of litigation. 108 U.S. at 77, 79. While any judgment would technically be

paid to the attorneys general in *New Hampshire*, the states were obligated to turn over all moneys collected (after deducting the costs of litigation) to the assignors, even though the states were the legal owners of the bonds. 108 U.S. at 78-79.

New Hampshire and New York then filed an original action in this Court against Louisiana. This Court held, however, that it lacked jurisdiction. Looking at the documents as a whole, the Court concluded that the plaintiffs were "mere collecting agent[s]" for the assignors, because the assignors "pay all expenses and get[] all the money that is recovered." *New Hampshire*, 108 U.S. at 89. Whatever the external form, the Court concluded, the actions "are prosecuted and carried on altogether by and for" the assignors. *Id.* The Court accordingly concluded that the action was not a controversy between two states that was within the Court's original jurisdiction. See also *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 336-342 (1895) (no diversity jurisdiction where transfer of legal title to claims to a newly created corporation was done without any consideration and where sole benefit of claims remained with stockholders of grantor, who also controlled the plaintiff corporation).

In cases such as *New Hampshire* and *Lehigh*, this Court (unlike the court of appeals) refused to "shut [its] eyes to the fact that there exists * * * an agreement" under which a plaintiff, who "neither paid or assumed to pay anything," "was invested with the technical legal title for the purpose only of bringing a

suit in the federal court." *Lehigh*, 160 U.S. at 337, 342.[4]

That does not mean, however, that Article III standing is absent any time the proceeds of a suit will be "turned over or accounted for to another." BIO 6. Article III standing would exist, for example, if the judgment were subject to garnishment, had been independently obligated by the assignee to another in exchange for an acquisition or relief of indebtedness, or was promised as a charitable donation. The plaintiff in such cases would retain a direct stake of its own in the outcome of the litigation because the judgment would benefit him personally by relieving indebtedness, satisfying a legal obligation, making an acquisition possible, or fulfilling eleemosynary goals. What is critical is that the plaintiff in those cases

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[4] See, *e.g.*, *Lincoln Property Co. v. Roche*, 546 U.S. 81, 91-92 (2005) (discussing cases); *Navarro Savings Association v. Lee*, 446 U.S. 458, 465 (1980); *Oklahoma v. Atchison, Topeka & Santa Fe Ry.*, 220 U.S. 277, 289 (1911) (no original jurisdiction where State has no "direct interest of its own" and "seeks not to protect its own property, but only to vindicate the wrongs of some of its people"); *Little v. Giles*, 118 U.S. 596, 605, 607 (1886) (no diversity jurisdiction where, although plaintiff was conveyed full power of attorney to sue, dispose of lands, and manage and control property, no consideration was paid for the conveyance and plaintiff "really had no interest in the matter, and * * * the deed to him was made for the sole purpose of giving the circuit court jurisdiction"); *Inhabitants of the Township of Bernards v. Stebbins*, 109 U.S. 341, 355 (1883) (no jurisdiction over bonds transferred to plaintiff "for the purpose of collection"); *Wood v. Davis*, 59 U.S. (18 How.) 467, 469 (1855) (no diversity jurisdiction where named parties had no "interest of their own in the subject in controversy"); cf. *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 827 (1969) (assignment "for purposes of collection only" is collusive and barred by 28 U.S.C. 1359).

(whether an assignee or not) would have the legal right to receive judicial redress for itself, to control the litigation in its own interests, and independently to redirect the proceeds to satisfy the plaintiff's own obligations, interests, or needs.

Here, by contrast, respondents never had any right to receive the proceeds of the litigation for themselves, let alone the authority to divert the relief to satisfy their own legal obligations or interests. The right to redress on the dial-around claims never left the payphone operators' hands and was never any part of the assignment. Instead, the assignment simply deputized respondents to serve as "exclusive agent[s] for [the] collection" process, Pet. App. 117. Even if the arrangement were perfectly valid as a matter of assignment or contract law, Article III standing requires respondents to have the kind of "concrete interest in the outcome of the proceedings," *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2008 n.3 (2007) (Scalia, J., concurring), that the assignment in this case deliberately withheld.

B. The Assignments' Designation Of A Circumscribed Collection-Agent Role For Respondents Is Insufficient To Transfer The Payphone Operators' Injuries-In-Fact To Respondents.

The collection-agent role assigned to respondents is so circumscribed as to fail not only Article III's redressability requirement, but also the injury-in-fact requirement. An interest only in litigating "on behalf of" others to collect money for them is not the type of individualized and particularized "legally protected

interest" that is cognizable under Article III. *Lujan*, 504 U.S at 560.

Because respondents themselves stand neither to gain nor lose anything as a result of their collection action, their only interest in pursuing the litigation is their desire to see the law enforced on their clients' behalf. But this Court has repeatedly held that "the psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under Art. III." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). "[M]otivation is not a substitute for the actual injury needed by the courts and adversaries to focus litigation efforts and judicial decisionmaking." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226 (1974). Respondents are at best "concerned bystanders," *Valley Forge*, 454 U.S. at 473, in what is fundamentally a dispute between petitioners and the payphone operators. Respondents' interest is no different than the lawyers who represent them. If anything, the lawyers may have more of an interest if their fees are contingent. But lawyers clearly do not have standing to pursue litigation in the lawyers' name on behalf of their clients. Article III's requirement of a concrete and individualized injury in fact is designed "to put the decision as to whether review will be sought in the hands of those who," unlike respondents, "have a direct stake in the outcome" of the litigation, *id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)). See

Warth, 422 U.S. at 510 ("an incidental congruity of interest" does not establish Article III standing).[5]

In concluding that the injury-in-fact requirement was satisfied, the court of appeals surmised that the assignment conveyed "all rights, title and interest" in the claims to respondents. Pet. App. 11-12 (quoting assignment). But the formal transfer of title made no difference in *New Hampshire* and *Lehigh*, where Article III's original and diversity jurisdiction were invoked. *Lehigh*, 160 U.S. at 336-342; *New Hampshire*, 108 U.S. at 78-89. There is no reason for a different outcome when the issue is whether the Constitution's case-or-controversy requirement is satisfied. See U.S. Const. art. III, § 2.

Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938), similarly runs counter to the court of appeals' supposition that the proclaimed transfer of legal title to the operators' claims created federal jurisdiction. In *Cook*, this Court rejected Oklahoma's invocation of original jurisdiction to enforce the liability of a shareholder of a state bank. Although the State had acquired "legal title to [the] cause of action against the defendant," the Court "look[ed] beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest." *Id.* at 392-393. Because "recovery is sought solely for the benefit of the depositors and creditors of

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[5] Respondents thus have *less* financial interest in the outcome of the suit than plaintiffs who attempt to assert federal taxpayer standing. While an individual taxpayer's interest in the moneys she paid into the federal treasury "is comparatively minute and indeterminable," *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2563 (2007), it is not non-existent.

the bank," making the State "a virtual trustee for the benefit of the creditors of the bank," the State's legal title did not "confer jurisdiction upon this Court." *Id.* at 395-396. The Court concluded that the "taking of legal title by the State [wa]s a mere expedient for the purpose of collection," and the State "must show a direct interest of its own" to establish original jurisdiction under Article III. *Id.* at 396. See also *Kansas v. United States*, 204 U.S. 331, 340-341 (1907) (Court lacked original jurisdiction over suit by State as trustee for the benefit of a railway company). Likewise here, respondents' assumption of "legal title" to litigate the payphone operators' claims "is a mere expedient for the purpose of collection," not a "direct interest of its own" that can support Article III standing. *Cook*, 304 U.S. at 396.

In any event, a plaintiff cannot contract itself around Article III, so the determinative inquiry must focus on what "right, title and interest" was assigned. And the language in the assignment at issue that immediately precedes the words "rights, title, and interest" explicitly states that the assignment transferred only the right "of collection," Pet. App. 114, not of ownership or control over the allegedly unpaid funds or even control over the litigation. Indeed, when read as a whole, the assignment and its accompanying documents constitute nothing more than a contract for legal services. While the arrangements authorized respondents to conduct and superintend the mechanics of litigation "on behalf of" the payphone operators, it gave them no more personal interest in the litigation than an attorney who files suit in her own name rather than that of her client.

In addition, the agreement explicitly advises payphone operators that, if they discontinue funding the litigation, Pet. App. 126, or otherwise withdraw from representation by respondents, "you [the the payphone operator] will be able to pursue *your claims* on your own," *id.* at 127 (emphasis added). The payphone operators thus have retained the rights not only to the full proceeds of the litigation and to ensure that the litigation is conducted in their interests and "on their behalf," but also to take their supposedly assigned claims back at any time they choose just by discontinuing payment of the litigation fees. The terms of the collection agreement thus belie any suggestion that respondents acquired through assignment a sufficient injury to satisfy Article III.

Respondents also ignore that history was central to the Court's ruling in *Vermont Agency* that *qui tam* relators have Article III standing to assert the United States' injuries. Indeed, the Court anchored its holding in "the long tradition of *qui tam* actions in England and the American Colonies" through which, for a bounty, private individuals could assert the government's claims. 529 U.S. at 774. The Court traced the English common law origins of *qui tam* suits all the way back to the thirteenth century, "when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf." *Id.* at 775. The Court further noted that, when "common-law *qui tam* actions gradually fell into disuse" in the fourteenth and fifteenth centuries, "Parliament began enacting statutes that explicitly provided for *qui tam* suits." *Id.* The Court found of particular relevance to the modern-day standing of

qui tam relators under the FCA were English statutes from the 15th Century forward "that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves." *Id.* Turning to the early American practice, the Court observed that "[*q*]*ui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution." *Id.* at 776. The Court explained that it canvassed the history of Anglo-American *qui tam* actions in which relators suing for a bounty were authorized to assert the government's injuries because "Article III's restriction of the judicial power to 'Cases and Controversies' is properly understood to mean 'cases and controversies of the sort *traditionally* amenable to, and resolved by, the judicial process.'" *Id.* (quoting *Steel Co.*, 523 U.S. at 102) (emphasis added). And given the deep roots of *qui tam* actions that its survey had uncovered, the Court declared the history to be "well nigh conclusive with respect to * * * whether * * * a *qui tam* relator under the FCA has Article III standing." *Id.* at 777-78. It was thus the 700 years of tradition and practice of *qui tam* actions in England and America that led the Court in *Vermont Agency* to conclude that the FCA's partial assignment of the United States' injuries conferred Article III standing on bounty-driven *qui tam* relators. There is no comparable tradition and practice of standing by assignees for collection only, who lack any direct or personal stake in the outcome of litigation brought to vindicate the assignors' injuries.

C. *This Court's Decisions in Titus and Spiller Provide No Support For Respondents' Claim Of Article III Standing.*

This Court's decisions in *Titus v. Wallick*, 306 U.S. 282 (1939), and *Spiller v. Atchison, Topeka & Santa Fe Railway*, 253 U.S. 117 (1920), do nothing to support respondents' claim of Article III standing. First, the question of federal court jurisdiction was not discussed in either case. This Court has made clear that "drive-by jurisdictional rulings" – in which jurisdiction is "assumed without discussion by the Court" – "have no precedential effect." *Steel Co.*, 523 U.S. at 91; see *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (same); *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."). That is particularly true when, as here, the decisions predate the development of this Court's modern Article III standing jurisprudence. Accordingly, the fact that this Court permitted the cases in *Titus* and *Spiller* to proceed says nothing about whether those plaintiffs or respondents here have Article III standing. Nor are *Titus* or *Spiller* otherwise instructive with respect to the question presented by this case.

In *Titus*, the Ohio Supreme Court had failed to accord full faith and credit to a New York state judgment obtained by Titus. The Ohio court had concluded that the New York judgment was procured by fraud because Titus had sued under an assignment that "was given for the purpose of enabling [Titus] to bring the suit," *id.* at 288, and any proceeds "were to be turned over or accounted for to another," *id.* at

289. This Court held that the Ohio Supreme Court erred in failing to accord full faith and credit to the New York judgment. *Id.* at 289-292.

Respondents read *Titus* as foreclosing petitioners' standing objection (BIO 6), because the decision concluded that the assignment's "legal effect was not curtailed by the recital that the assignment was for purposes of suit and that its proceeds were to be turned over or accounted for to another." *Id.* (quoting *Titus*, 306 U.S. at 289). But that statement is of no help to respondents. All the Court said was that the assignment was legally valid *under state law*, as evidenced by its preceding citation of eight New York state cases as authority for the legality of the assignment. *Titus*, 306 U.S. at 289; see *id.* (explaining in the sentence introducing the language on which respondents rely that the assignment "was sufficient under the New York statutes and authorities to give petitioner dominion over the claim," and it was "[i]n that respect," that its "legal effect was not curtailed").

The validity of an assignment under state law does not, however, automatically create Article III standing for the assignee. Indeed, this Court has held that "the undisputed legality of [an] assignment under [state] law" does not "necessarily render[] it valid for purposes of federal jurisdiction," because "[t]he existence of federal jurisdiction is a matter of federal, not state law." *Kramer*, 394 U.S. at 829. Whether the assignment in *Titus* was sufficiently broad to confer Article III standing is a question about which the opinion is wholly silent.

Nor, in any event, would there have been any occasion for this Court to address the question of Arti-

cle III standing of assignees in *Titus*, even if it had been raised. Titus was *not* suing as an assignee when he filed suit in Ohio under the Constitution's Full Faith and Credit Clause, art. IV, § 1. "The suit in Ohio [and thus before the Supreme Court] was not upon the assigned cause of action," this Court explained, "but upon the judgment of which petitioner is the record owner," and "[i]t is the judgment and not the cause of action which gave rise to it for which credit is claimed" under the Full Faith and Credit Clause. *Titus*, 306 U.S. at 291. Here respondents are suing solely under the assignment.

Respondent's reliance on *Spiller v. Atchison, Topeka & Santa Fe Railway*, 253 U.S. 117 (1920), fares no better. Spiller sued in federal court to enforce a reparation order issued by the Interstate Commerce Commission in his favor. *Id.* at 120, 124. The order made an award both to Spiller, who was the secretary of the Cattle Raisers' Association and an assignee of a number of the Association's members, and to other shippers of cattle. *Id.* at 122, 124, 125. The defendants argued in federal court, *inter alia*, that the Commission lacked the authority to enter an award in favor of Spiller because the assignments allegedly failed to vest legal title in the claims. *Id.* at 133. This Court rejected that argument, holding that the assignments were valid as a matter of law. *Id.* at 134. In so holding, this Court explained that, although legal title had been validly conveyed, "the beneficial or equitable title" remained in the Association's members. *Id.* The Court concluded that beneficial title "was not necessary to support the right of the assignee to claim an award of reparation

and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claim." *Id.*

That aspect of *Spiller* is of no help to respondents. As in *Titus*, this Court addressed only the legal validity of the assignment, which is not at issue before this court. The question of Article III standing was neither raised nor discussed by the Court, and the case thus established no precedent governing assignee standing. See, *e.g.*, *Arbaugh*, *supra*. Nor did the case present the opportunity for this Court to resolve any such standing question. Spiller sued as assignee before a federal agency, the Interstate Commerce Commission. The jurisdiction of federal agencies is not bound by Article III's case-or-controversy limitation. In federal court, Spiller did not sue as an assignee. Rather, Spiller's suit in federal court was brought to enforce an agency judgment that had been duly entered in his own name. See *id.* at 120. In any event, because Spiller was the head of a trade association, and had been assigned the agency's claims in that capacity, *id.* at 124, he also had associational standing to seek an order enforcing the Commission's decision in favor of the Association's members. See, *e.g.*, *Hunt*, 432 U.S. at 342-43; cf. *Spiller*, 253 U.S. at 125 ("The reparation claims in controversy appear to have been filed in due season by the Cattle Raisers' Association in behalf of its members.").

In sum, respondents' reliance on *Spiller* and *Titus* is entirely misplaced. Neither decision endorses the Article III standing of assignees (such as respon-

dents) who have only a right to sue but no personal right to redress.[6]

D. Federal Rule Of Civil Procedure 17 Does Not Affect Respondents' Standing.

The court of appeals (Pet. App. 14-16) and respondents (BIO 7-8 & nn. 5-6) contend that respondents have standing because they are a real party in interest to the litigation under Federal Rule of Civil Procedure 17(a). That Rule provides that "[a]n action must be prosecuted in the name of the real party in interest." Even assuming that respondents are real parties in interest for purposes of Rule 17, that status would do nothing to advance respondents' Article III standing. The problem for respondents is that Rule 17 "address[es] party joinder, not federal-court subject-matter jurisdiction." *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 90 (2005). Indeed, Federal Rule of Civil Procedure 82 expressly directs that the Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts." See also *Lincoln Property*, 546 U.S. at 90.

Moreover, if the court of appeals were correct that the personal stake required by Article III and the personal interest required by Rule 17 are one and the

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[6] Even assuming that respondents are correct in reading *Titus* and *Spiller* as establishing Article III standing precedent, the two decisions have long since been superseded by this Court's modern standing jurisprudence, which unequivocally holds that Article III standing does not exist when the plaintiff lacks a personal stake in the outcome of the litigation. Tellingly, this Court has not cited *Titus* or *Spiller* in any of its modern-day Article III standing decisions. In fact, this Court has not cited either decision for any purpose in decades: *Titus* was last cited in 1951, and *Spiller* in 1966.

same (Pet. App. 16), then Congress could legislatively nullify Article III's standing requirements. That is because Rule 17 provides that a party "authorized by statute" may sue as a real party in interest. This Court, however, has made clear that any grant by Congress of statutory standing still must conform to the Constitution's commands. See *Lujan*, 504 U.S. at 571-578 (limiting scope of citizen-suit provision of the Endangered Species Act, 16 U.S.C. 1540(g)); *Valley Forge*, 454 U.S. at 487 n.24 (no "congressional enactment[] can lower the threshold requirements of standing under Art. III"); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) ("But [statutorily] broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.").

Rule 17 thus takes standing law as it finds it and addresses only the follow-on question of whether and when an individual or entity that has Article III standing may sue in its own name without joining the person on whose behalf the action is litigated. See 6A C. Wright & A. Miller, *Federal Practice & Procedure* § 1542, at 330 (2d ed. 1990) ("[E]lements of the standing doctrine are clearly unrelated to the rather simple proposition set out in Rule 17(a), and plaintiff must *both be the real party in interest and have standing*.") (emphasis added).

II. RESPONDENTS' SUIT IS FORECLOSED BY THE PRUDENTIAL STANDING DOCTRINE.

Separate and apart from its Article III standing principles, this Court has developed a prudential

standing doctrine, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (internal quotations omitted). The prudential standing doctrine serves to protect the institutional interests of the federal judiciary. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). Thus, under the prudential standing doctrine, even when a plaintiff has Article III standing, federal courts may decline, as a prudential matter, to hear the plaintiff's suit.[7]

Respondents' suit against petitioners runs afoul of three core elements of this Court's prudential standing doctrine. First, respondents are litigating over the asserted rights of third parties – the payphone operators – to monetary compensation. Second, there is no barrier to the operators bringing suit themselves to recover the money allegedly owed to them. Third, respondents do not come within the zone of interest of the law on which their claim for relief on behalf of the payphone operators rests. Accordingly, even if this Court were to conclude that respondents have Article III standing, it should hold that respondents' suit is foreclosed on prudential standing grounds.

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[7] In the decision below, the majority ignored prudential standing considerations altogether, notwithstanding that the parties briefed the issue.

A. *Respondents' Assertion Of The Legal Rights Of Third Parties Counsels Against The Exercise Of Jurisdiction.*

This Court consistently has expressed "reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." *Warth*, 422 U.S. at 501; see *Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 955-956 (1984) (a plaintiff ordinarily "cannot rest his claim to relief on the legal rights or interests of third parties"); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977) ("In the ordinary case, a party is denied standing to assert the rights of third persons."); *Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (federal courts "must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation").

This Court's strong reluctance to exercise jurisdiction in such cases is rooted in the basic proposition that standing principles are designed to ensure that the parties to the litigation are adverse to each other, and that the litigation will be fair and final. The Court repeatedly has recognized that those purposes are more likely to be achieved when the individual whose rights are at stake is a party to the litigation and is indisputably bound by any final judgment. See *United Food and Commercial Workers Union v. Brown Group*, 517 U.S. 544, 556 (1996) (requiring the presence of the individuals whose rights are most directly at stake "may well promote adversarial intensity"); *Holden v. Hardy*, 169 U.S. 366, 397 (1898) (assertion of third parties' rights would come with

"greater cogency" from the third parties themselves); cf. *Taylor v. Sturgell*, No. 07-371 (cert. granted Jan. 11, 2008) (considering the claim preclusive effect of "virtual representation").

Those prudential standing considerations loom particularly large when, as here, the plaintiffs seek not group-wide injunctive or declaratory relief, but rather, individualized damages on behalf of absent third parties. Indeed, this Court has expressly cautioned against the "hazard[s]" of having a plaintiff litigate the damages claims of third parties. *Brown Group*, 517 U.S. at 556. For example, in *Warth*, this Court explained that, when damages claims are "peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof," then each individual "who claims injury as a result of [the defendants'] practices must be a party to the suit," rather than represented by a third party. 422 U.S. at 515-516.

The Court further emphasized, in *Brown Group*, that prudential limitations on vicarious damages litigation "guard against the hazard of litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity." 517 U.S. at 556. In addition, the prudential bar "hedge[s] against any risk that the damages recovered by the [plaintiff] will fail to find their way into the pockets of the members on whose behalf injury is claimed," *id.*, or, alternatively, that the third parties will disavow or attempt to avoid the binding effect of any judgment entered on the claims, spawning collateral and duplicative litigation. While those prudential concerns may be

overcome by statutory directive or perhaps even common-law rule, see *Brown Group*, 517 U.S. at 557, respondents' collection-agent theory of standing has no such support.

Compounding the risks inherent in suits to recover damages for third parties are the myriad difficulties in conducting meaningful discovery in such suits. The heart of the problem is that third parties who do not participate in the litigation simply are not subject to the normal discovery process under Federal Rules of Civil Procedure 26 and 33 to 36, and they are not directly subject to trial management orders. See generally Brief of *Amicus Curiae* Qwest Communications Corp. in Support of Petitioners at 4-5 (discussing the "haphazard results from informal discovery" and failure of service providers to respond to questionnaires). In addition, petitioners have asserted numerous counterclaims. But the payphone operators assigned respondents only the authority to collect on the operators' claims. The operators have not assigned their liabilities to respondents or authorized respondents to litigate those liabilities on their behalf. Nor have the operators promised to abide by judgments procured by the respondents that impose liability on the operators. See *id.* at 5-6.

In addition, the terms of the assignment raise the specter of collateral litigation over whether the resulting judgment (if any) in respondents' favor would be binding on the service providers. The payphone operators agree to be bound by a final judgment only if respondents litigate "in the Company's interest." Pet. App. 115. The accompanying documents also require respondents to exercise "reasonable discretion"

in litigation decisions and to take only those measures that are "reasonably necessary and appropriate" to collect the service providers' damages. *Id.* at 117; see *id.* at 118 (respondents can take "reasonable step[s]"; service providers will accept only "reasonable determinations" by respondents). Indeed, the accompanying agreement acknowledges only that a settlement "*may* preclude any further claim by [the service provider] for the amounts in dispute." *Id.* at 119 (emphasis added).

A central function of Article III's standing requirement is to ensure that claims are presented by the party "whose interests entitle him to raise it," *Valley Forge,* 454 U.S. at 474, rather than to consume judicial authority and resources in shadow litigation that may or may not definitely resolve, in a full and fair adversarial form, the claims presented for resolution. Litigation that may have no controlling effect either on the plaintiffs or the entities on whose behalf they purport to litigate does not constitute a "case" or "controversy" within the meaning of Article III. Cf. *United States Nat'l Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 446 (1993) ("The exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy," and "a federal court [lacks] the power to render advisory opinions.").

In short, if the operators wish to enjoy the possible fruits of recovering damages in federal court litigation, then they should file suit themselves and subject themselves to the authority of the court, ordinary discovery processes, full adversarial proceedings, and the attendant risk of a binding adverse judgment. If

the prudential standing doctrine has any force, it means that federal courts should not exercise jurisdiction over suits brought on behalf of companies that have contracted out all litigation obligations, burdens, and risks, while retaining exclusively for themselves all the benefits of a favorable outcome.

B. There Is No Barrier To Suits By The Payphone Operators Themselves To Recoup The Money That Respondents Seek To Recover On Their Behalf.

The "ordinary rule" of the prudential standing doctrine that militates against granting standing to a plaintiff to assert the rights of third parties promotes the integrity and functioning of the judicial process. *Valley Forge*, 454 U.S. at 474. Accordingly, departures from that rule should be approved sparingly. In considering whether to make an exception and permit the plaintiff to assert the rights of a third party, this Court has examined whether the third party would be unable "to advance his own rights." *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 623 n.3 (1989); see *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (considering "whether there is a 'hindrance' to the possessor's ability to protect his own interests"); *Diamond v. Charles*, 476 U.S. 54, 65-66 (1986) (standing of doctor to assert right of "individuals who are unable to assert those rights themselves"). If there is, in fact, "a genuine obstacle" to the third party's prosecution of his own suit, then this Court has relaxed its prudential standing restrictions and held that a federal court can exercise jurisdiction over a suit brought to vindicate the third party's rights. *Singleton*, 428 U.S. at 116.

No such obstacle exists in this case. The payphone operators are commercial entities seeking monetary damages from other commercial entities. Indeed, the fact that at least one of the operators here was fully capable of suing in its own right underscores the absence of any significant hindrance. Pet App. 8, 10 ** At bottom, the operators do not appear to be disabled by anything, other than perhaps a lack of motivation, "from asserting their own right[s]." *Warth*, 422 U.S. at 510. But a central purpose of prudential limitations on standing is to avoid the adjudication of rights of persons who may not be motivated to assert those rights. See *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 80 (1978). Where, as here, there is "no genuine obstacle" to a third party asserting his own rights, his "absence from court * * * suggest[s] that his right is not * * * truly important to him," and "it may be that in fact the holders of those rights * * * do not wish to assert them." *Singleton*, 428 U.S. at 113-114, 116.

Respondents have suggested that the payphone operators prefer consolidation of their claims in a single lawsuit for efficiency reasons. That may be so, but this may simply be another way of saying they lack motivation. In any event, the operators' preferences do not constitute a "genuine obstacle" to the filing of their own suit. If the operators want to sue collectively, then they should have jointly filed this action or sought certification of a class action under Rule 23 rather than (as discussed below) bypassing the vital safeguards that Rule provides for class members, defendants, and the courts.

C. *Respondents Do Not Fall Within The Zone Of Interests Of The Law On Which The Asserted Rights Of The Payphone Operators Are Predicated.*

Prudential standing strictures may give way when the plaintiffs fall within the "zone of interests" protected by the law on which the rights of third parties are predicated. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). This Court has said that such play in the joints of prudential standing exists because, unlike the mandates of Article III standing, prudential standing concerns "can be modified or abrogated by Congress" through statutory expansion of interests protected by a law. *Id.* The problem for respondents is that Congress took no such action here.

Respondents are suing under the provisions of the Federal Communications Act dealing with payphone compensation issues and the FCC's regulations implementing those provisions. But on their face, the statute and regulations govern relations between the long-distance carriers and payphone operators, not between long-distance carriers and aggregators who contract with operators, and the statute and regulations are designed to provide a mode of compensation for the operators, not for the aggregators. See *Global Crossing*, 127 S. Ct. 1518. Nothing in the statute remotely suggests that Congress intended courts to lift prudential restrictions on third-party standing in actions for dial-around compensation. By its terms, Section 207 of the Communications Act only allows a private right of action for the person actually "damaged" – *i.e.*, the payphone operator – by a common carrier's alleged violation of the Act (*i.e.*, Section

201(b)). See 47 U.S.C. §§ 201(b), 207 . That limitation is manifested in the FCC's implementing regulations. See *Pay Telephone Reclassification and Compensation Provisions*, Report & Order, 18 F.C.C.R. 19975 ¶ 32, 2003 WL 22283556 (2003) ("PSPs [have] remedies to recover [payphone] debt from the delinquent carriers"); 47 C.F.R. 64.1300(d) (2007) (allowing compensation for the "payphone service provider"). There is nothing in the language of Section 201(b), Section 207, or the FCC's regulations that places third-party assignees who have agreed to pass all proceeds back to the payphone operators within the zone of interests protected by those laws. Indeed, as this Court observed in *Global Crossing*, "[t]he history of these sections * * * simply reinforces the language, making clear the purpose of § 207 is to allow *persons injured by § 201(b) violations* to bring federal-court damages actions." 127 S. Ct. at 1518 (emphasis added).

In light of the plain language of the statute and regulations, respondents do not come within the zone of interest protected by the law on which the asserted rights of the payphone operators are predicated. Thus, there is no reason for this Court to lower the prudential standing bar to suits that seek to vindicate the rights of third parties.

D. Finding Standing In These Circumstances Would Evade The Limits That This Court Has Imposed On Associational Standing.

Relaxing the prudential standing doctrine here would also be inconsistent with this Court's "associational standing" jurisprudence. Under that body of law, this Court has carved out an exception to the

general rule barring litigants from raising the claims of third parties for cases in which an association asserts a claim on behalf of its members. This Court however, has established firm limitations on the standing of associations. In particular, the Court has held that an association has standing to bring claims on behalf of its members only when "(a) the members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343 (1977); see *International Union, UAW v. Brock*, 477 U.S. 274 (1986). Respondents do not meet the standard.

Respondents are not an association and the payphone operators are not members of the respondents. The respondents are "incorporated entities * * * and their clients [the operators] are no more their 'members' than a law firm's clients are the firm's 'members.'" Pet. App. 35. Moreover, the claims asserted by respondents, which are for alleged damages suffered by the payphone operators individually, require the participation of the payphone operators for fair and effective adjudication. *Warth*, 422 U.S. at 515-516 (1975) (association lacks standing to pursue damages claims on behalf of individual members); see *Hunt*, 432 U.S. at 344 (association had standing to seek declaratory and injunctive relief on behalf of its members because such relief did not "require[] individualized proof" and thus could be "properly resolved in a group context").

E. Vesting Respondents With Standing Would Substantially Undermine Class Action Protections.

A further prudential barrier to standing is that collection-agent standing circumvents the important protections for class action members embodied in Federal Rule of Civil Procedure 23. Those procedures have been developed by Congress and the judiciary through many decades of study and experience as the best vehicle to protect the interests of both the courts and the parties in cases in which a named plaintiff sues on behalf of unnamed persons.

This litigation bears all of the hallmarks of a Rule 23 class action. A handful of named plaintiffs (respondents) seek to pursue claims on behalf of a much larger group of unnamed persons who are not participating in the litigation (the payphone operators). See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (class action device enables a "few [to] sue for the benefit of the whole"). And as in a Rule 23 class action, the named plaintiffs maintain that a single, consolidated lawsuit would be a more efficient and practical mode of litigation than multiple, individualized lawsuits. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (A "[c]lass action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.").

Indeed, when the district court initially dismissed the respondents' suit against AT&T for lack of Article III standing, respondents moved to have the case certified as a class action with a payphone operator as

the class representative. See *supra* at 8.[8] That request, however, would have required respondents to demonstrate that proceeding in a class action would comport with the "safeguards provided by the Rule 23(a) and (b) class qualifying criteria." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997). See 7B C. Wright et al., *Federal Practice and Procedure* § 1798 (3d ed. 1998) ("The burden of establishing a right to maintain an action under Rule 23 falls, of course, on the party seeking to utilize the procedure * * *.") Those safeguards protect the interests of class action defendants and absent class members by ensuring that it is fair for all concerned to proceed on a collective basis, contrary to "the usual rule that litigation is conducted by and on behalf named parties only." *Califano*, 442 U.S. at 700-01. See also *International Union*, 477 U.S. at 296 (Rule 23 "safeguards * * * ensure that the diverse interests of class mem-

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[8] Notably, six payphone operators sued Sprint for asserted violations of the FCC's dial-around payphone compensation regulations, and moved to certify a class of payphone operators. But after the district court's decision in the AT&T case holding that respondents had Article III standing to sue petitioners (which was affirmed by the court of appeals), the operators who had sued Sprint realized that they did not have to satisfy the Rule 23 class certification requirements anymore. Accordingly, they voluntarily dismissed their class action suit in favor of the suit brought on their behalf by aggregator-respondents. *D & B Tels., Inc. v. Sprint Commc'ns Co. L.P.*, No. 03-1444, Order Granting Motion for Voluntary Dismissal (D.D.C. Sept. 29, 2003). This same pattern of a putative class action brought by operators followed by a suit brought in the operators' behalf by aggregators occurred in related litigation against *amicus curiae* Qwest Communications Corp. See Brief of *Amicus Curiae* Qwest Communications Corp. in Support of Petitioners, at 10-11.

bers are properly represented by the named plaintiff seeking to bring a case on their behalf"). The district court could have certified the class only after conducting a "rigorous analysis" and concluding that Rule 23 safeguards were met. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

Ultimately, respondents never were required to prove that the case was suitable for class certification with a payphone operator as the class representative, because the district court reversed itself and held that the assignments from the operators bestowed Article III standing on the respondents to sue on the operators' behalf outside the Rule 23 framework. Pet. App. 83-106. The ease with which the assignments enabled respondents to bring what is, in substance, a class action free of Rule 23's protective restrictions raises serious prudential standing concerns. The careful calibration of the Rule 23 class action mechanism would be frustrated, and the protections it affords would dissolve, if assignees for collection purposes only are deemed to have standing to sue on behalf of a putative class. The court of appeals' ruling that plaintiffs who have suffered no personal injury and have no stake in the outcome of the litigation can sue based on nothing more than a collection-agent assignment is an invitation evasion of Rule 23's protections. See *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (class representatives "must be part of the class and possess the same interest and suffer the same injury as the class members" on whose behalf they are suing (internal quotations omitted)); see also *O'Shea v.*

Littleton, 414 U.S. 488, 494 (1974).[9] This Court should decline the invitation.

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[9] At the time the complaint was filed, a small number of aggregators held an ownership stake in a few individual PSPs. The complaint, however, did not purport to pursue those aggregators' claims on that basis. Nor would such a marginal ownership share give those aggregators a sufficient direct stake in the outcome of the case to confer standing, either under Article III or at least as a matter of prudential standing. See generally *Franchise Tax Bd. v. Alcan Aluminium, Ltd.*, 493 U.S. 331, 336 (1990); *Pagan v. Calderon*, 448 U.S. 16, 28-29 (1st Cir. 2006) (citing cases).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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In the Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P. & AT&T CORP.,

Petitioners

v.

APCC SERVICES, INC., *et al.*,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

As formulated by petitioners, the question presented is whether an assignee "that has no personal stake in the case" has standing to litigate on behalf of assignors. Pet. Br. i; Pet. i. As was pointed out in the brief in opposition (at 4 n.3), this case does not present that question. The court below expressly held that respondents do have the "personal stake required under Rule 17(a)" and that the "interest required for standing" is identical in this context. Pet. App. 16.

This Court presumably will decide whether the court below was right or wrong in that conclusion—not whether one who "has no personal stake in the case" has standing, a question that has never been in dispute at any stage of this litigation. Accordingly, the question actually presented is as follows:

Whether an assignee that has been given "all rights, title and interest" in an assignor's relevant "claims, demands or causes of action" (Pet. App. 114) has standing, when a separate agreement (Pet. App. 116-121) obligates the assignee to return to the assignor the amounts collected on its behalf, provided the assignor has stayed current in its obligation to fund the litigation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, defendants and appellants below, are Sprint Communications Company L.P. and AT&T Corp.

Respondents, plaintiffs and appellees below, are APCC Services, Inc.; Data Net Systems, L.L.C.; Davel Communications Group, Inc.; Jaroth, Inc. d/b/a Pacific Telemanagement Service; NSC Telemanagement Corp., n/k/a Intera Communications Corporation; and Peoples Telephone Co., Inc.

APCC Services, Inc., a Virginia corporation, is a for-profit subsidiary of the American Public Communications Council, Inc., a District of Columbia not-for-profit corporation that is not publicly traded.

Data Net Systems, L.L.C., is an Illinois Limited Liability Company that is not affiliated with any publicly traded company.

Davel Communications Group, Inc. is an Illinois corporation whose parent corporation, Davel Communications, Inc., is a wholly owned subsidiary of MobilPro Corp., which is a publicly traded corporation. No publicly traded corporation holds a 10 percent or greater ownership in MobilPro Corp.

Jaroth, Inc. d/b/a Pacific Telemanagement Services is a California corporation that is not affiliated with any publicly traded company.

NSC Telemanagement Corporation n/k/a Intera Communications Corporation is a Delaware corporation that is not affiliated with any publicly traded company.

Peoples Telephone Company, Inc., is a New York corporation whose parent corporation, Davel Communications, Inc., is a wholly owned subsidiary of MobilPro Corp., which is a publicly traded corporation. No publicly traded corporation holds a 10 percent or greater ownership in MobilPro Corp.

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BRIEF FOR RESPONDENTS

STATEMENT

Respondents, some of whom are "aggregators," sued petitioner AT&T in 1999 for failure to pay approximately 1400 payphone service providers (PSPs) amounts due under FCC rules governing dial-around calls. In so doing, the aggregators fulfilled their established role—long endorsed by the FCC—of tracking dial-around compensation owed by inter-exchange carriers (IXCs) and collecting it on behalf of PSPs.

Respondents did not merely act as agents for the PSPs. Instead, the PSPs assigned to respondents "all rights, title and interest of the [PSP] in the [PSP's] claims, demands or causes of action for 'Dial-Around Compensation.'" Pet. App. 114. As the D.C. Circuit observed, there is "no reason to believe the assignment is anything less than a complete transfer to [respondents] of the PSP's dial-around compensation claim." Pet. App. 12.

The assignments under which respondents sued said *nothing* about remitting proceeds to the PSPs. The aggregators and PSPs did, however, execute a second agreement to reflect that the aggregators would distribute litigation proceeds among the PSPs that funded the litigation. That collateral agreement did not purport to modify the assignment.

No court has ever held that an assignee with unfettered legal title to a claim lacks standing to pursue it merely because it has reached a collateral agreement to dispose of litigation proceeds in a particular way. To the contrary, nearly 90 years ago, this Court held that an assignee could invoke the jurisdiction of a federal

court, even though the benefits of the litigation would inure to someone else. *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117, 134 (1920). The result here should be no different.

A. Regulatory Background

1. PSPs have long been required to permit callers to choose the inter-exchange carrier (IXC) that will carry the calls they make from a payphone. See 47 U.S.C. § 226(c)(1)(B); *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513, 1517-1518 (2007). But, when a caller makes a coinless call and chooses an IXC with which the PSP has no contractual relationship, the task of ensuring compensation for the PSP is complex. Although carriers can contract with PSPs to pay compensation, there is no incentive to do so since PSPs are required to allow payphone users to dial all carriers' access codes; PSPs cannot deny service even to a carrier that says it won't pay. Litigation to collect is the only direct remedy for the PSP.

At Congress's direction, in 1996, the FCC developed a compensation plan to ensure that PSPs are compensated for dial-around calls. See *Global Crossing*, 127 S. Ct. at 1518. The plan required IXCs such as AT&T to compensate PSPs for calls that the IXC "completes." *E.g.*, *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 20,541, 20,567-20,568, 20,586 (¶¶ 50-51, 86) (1996) (*First Payphone Order*). The Commission preferred this mechanism to a plan in which callers would directly compensate the PSP "because it would result in less transaction costs because the toll-carrier could aggregate its payment to [PSPs]." *Id.* at 20,580 (¶ 77). Those transaction cost savings

exist, in large measure, because of the functions performed by "aggregators" like respondent APCC Services, Inc. (APCCS), which collect billing information from a large number of PSPs, provide that information to IXCs or their agents, collect the IXCs' payments, and distribute those payments to PSPs.

2. Apart from their salutary role in streamlining the compensation process, aggregators are also necessary in practice because PSPs are typically small businesses lacking the technical ability or financial resources to pursue claims independently. See JA252 ("Several hundred APCC Services customers have between 1-5 payphones."). For PSPs with so few payphones, the cost of pursuing a contested claim against an IXC would outrun any recovery. See Br. in Opp. 17, *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications*, No. 05-705 (discussing fact that entire litigation involved only $30,000).

Even for larger PSPs, substantial practical barriers effectively prevent them from pursuing dial-around claims unilaterally. Without aggregators, PSPs may be unaware that a claim even exists. An IXC's failure to compensate PSPs is often revealed only by comparing the IXC's *total* dial-around call volume in a period to the *total* dial-around compensation it paid in that period. JA253-254. Such aggregate analysis is impossible for an individual PSP, which lacks information on call volume or compensation paid to any other PSP. Without aggregate data, a PSP cannot tell whether its lack of compensation results from an unknown IXC's nonpayment, payment irregularities from an IXC on the PSP's lines versus other PSPs' lines, or questionable systematic abnormalities in an IXC's reported call traffic. Because aggregators like respondent APCCS have access to analytical software and compensation

records for the majority of PSPs in the industry, they can identify responsible IXCs and compare an IXC's expected payments (given its dial-around call volume) to its actual payments. *Ibid.*

For these and other reasons, the FCC has recognized the indispensable role aggregators play in collecting compensation for dial-around calls. *E.g., Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 7 F.C.C.R. 3251, 3259 (¶ 49) (1992) (authorizing use of clearinghouses for billing and collection). Indeed, as the *amicus* brief of NetworkIP notes (at 7), aggregators have brought myriad cases before the FCC, which has never doubted the desirability of aggregators' litigating to collect compensation that IXCs failed to pay to PSPs. See, *e.g.*, *APCC Servs., Inc.* v. *NetworkIP, LLC*, 22 F.C.C.R. 4286 (2007); see also *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 F.C.C.R. 21,274, 21,302-21,303 n.151 (¶ 82 n.151) (2002) (FCC identified the present cases as means for PSPs to recover underpayments). Aggregators have "settl[ed] scores" of these cases. NetworkIP Br. 7. Not once in all of those cases has a PSP opted out of the lawsuit or agency proceeding, or claimed it is not bound by the aggregator's settlement decision.

Petitioner AT&T stands before this Court arguing that PSPs are the *only* proper plaintiffs in an action for dial-around compensation, yet AT&T has long *insisted* that all demands for payment, and all questions concerning disputed bills, must come *only* from the aggregators. AT&T refuses to deal with individual PSPs. JA252-253, 259-260, 264, 268, 272. AT&T even forbids the aggregators to disclose to PSPs the telephone

number of the AT&T representative who handles dial-around compensation issues. JA253.

B. The Assignments, The Separate Agreement Governing Proceeds Of Litigation, And Initial Proceedings Below

1. In anticipation of filing suit, respondent aggregators presented PSPs with two independent agreements and a cover letter. Approximately 1400 PSPs signed identical agreements.

Petitioners represent to this Court that there is but one relevant agreement between each aggregator and each PSP, which petitioners term "the assignment." That is simply false.

a. The first agreement between the aggregators and PSPs, titled "Assignment and Power of Attorney" (APOA), assigned to respondents "all rights, title and interest of the [PSP] in the [PSP's] claims, demands or causes of action for 'Dial-Around Compensation.'" Pet. App. 114. Consistent with that complete transfer, the APOA gives respondents plenary authority to sign

> settlement agreements, releases, or other documents relating to the settlement of [dial-around compensation] claims. [PSP] hereby agrees to be bound by any settlement, compromise or release reached by [aggregator] on its behalf and that any document executed in connection with any such settlement, compromise or release by [aggregator] on behalf of the [PSP] shall be binding on the [PSP].

Pet. App. 115.

The APOA also emphasized that the transfers to APCC were unconditional and could not be revoked

unilaterally, stating that "[t]his Assignment and Power of Attorney * * * may not be revoked without the written consent of the attorney-in-fact," *i.e.*, the aggregator. *Ibid.*

Nothing in the APOA obligates respondents to remit litigation proceeds to the PSPs. But see Pet. Br. 6 (asserting that "[t]he assignments bind the aggregators * * * to 'pass back to the [payphone operators] any amounts they recovered thereby'"). Rather, proceeds of litigation are covered in a *separate* agreement between PSPs and aggregators.

b. The second agreement between the aggregators and the PSPs is titled "Amendment to APCC Services Agency Compensation Agreement." Pet. App. 116-121.[1] This Compensation Agreement did not modify the APOA; instead, it amended the standing compensation arrangement between the aggregator and PSP (JA 182-206) in order to fund the dial-around litigation. See Pet. App. 119 (setting forth additional amounts respondents were allowed to deduct from compensation collected on PSPs' behalf). PSPs were made aware that, "[i]n the event that PSP chooses not to meet the funding requirements or PSP terminates the Agreement, [aggregator] will be relieved of any further obligation to represent PSP in the collection of PSP's DAC Claims and [aggregator] will have no obligation to remit to PSP any amounts previously deducted from PSP's DAC payments." Pet. App. 119-120.

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[1] The appendix to the certiorari petition makes it appear that the Compensation Agreement is simply a continuation of the APOA, on the same page. Pet. App. 116. As the original documents reproduced in the joint appendix filed in the D.C. Circuit show, the Compensation Agreement is actually a stand-alone document. See C.A. App. 135-138, reproduced as an Addendum to this brief.

The Compensation Agreement also explained the PSPs' and aggregators' division of responsibilities during the litigation. The aggregators would "take any reasonable step on PSP's behalf to collect payment for the DAC Claims, including, without limitation, * * * filing and prosecuting legal complaints * * *, and entering settlements * * * without obtaining further oral or written authorization from PSP." Pet. App. 118; see also Pet. App. 118-119 (reiterating settlement authority). The PSPs, in addition to funding, promised that they would "promptly provide [aggregator] with all documentation that [aggregator] or its counsel reasonably believes to be necessary in order to pursue collection of PSP's DAC Claims." Pet. App. 118.

c. The APOA and Compensation Agreement were sent to PSPs with a cover letter from an official of APCC Services. The letter explained in laymen's terms the reasons for assigning the claims to the aggregators, the need for additional funding, and the consequences of a PSP's failure to continue funding the litigation—namely, "You've got to pay to play and once you're in, you've got to stay in to reap the benefits." Pet. App.126. It explained that, "[i]f at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose." *Id.* at 127. However, the PSP would "*get nothing—no back dial around collected by this litigation or any return of your funding contributions*" as to claims assigned before the withdrawal. *Id.* at 126. No claim against petitioners (or *amici*) has ever, in fact, been transferred back to a PSP that had assigned its claim to one of the respondents in this case.

As the D.C. Circuit observed, "[t]he possibility that APCCS would no longer represent a PSP in litigation does nothing * * * to suggest the PSP could revoke the

assignment as long as APCCS continues to represent the PSP in the litigation." Pet. App. 12. True, "APCCS itself could repudiate the assignment and presumably would do so if it no longer wanted to represent the PSP in the litigation." *Ibid.* Even then the parties understood that at most APCCS would consider relinquishing the right to pursue the *prospective* value of the claims. Ruth Jaeger, Vice President of APCC, stated under penalty of perjury in a declaration submitted to Judge Huvelle in 2003:

> While the PSPs can terminate their funding obligation unilaterally, they cannot terminate unilaterally their assignment of claims. Paragraph 4 of the assignment requires the written consent of the plaintiff aggregators. * * * APCCS and the PSPs contemplated that any such termination, if allowed, would operate prospectively only, *i.e.*, as to claims for unpaid compensation that had not yet accrued and, therefore, were not encompassed by an ongoing suit. It is these **prospective** claims as to which APCCS would not be representing the PSP that the PSP will be able to pursue on its own, should it so choose.

Declaration of Ruth Jaeger ¶ 9, filed July 15, 2003, in *APCC Services, Inc.* v. *Cable & Wireless, Inc.*, Civ. Action No. 1:02 CV 0158 (ESH).[2]

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[2] Although the July 15, 2003, Jaeger Declaration was filed in *APCCS* v. *C&W*, Judge Huvelle had it before her when deciding the standing issue in the *Sprint* and *AT&T* cases now before this Court as well. The three cases proceeded before her in parallel fashion, and she held joint hearings and considered an order in one case to be dispositive of the issue in the other two. AT&T, too, recognized that the cases were joined at the hip—in its *Reply in Support of its Motion for Reconsideration* filed October 20, 2003, AT&T attempted to refute the argument that one plaintiff had standing by citing

Because withdrawing PSPs have only the right to pursue claims prospectively, the aggregators have from the beginning held at least a contingent interest in the proceeds of assigned claims. See *id.* ¶ 8 ("A PSP's refusal to continue to fund this litigation * * * vitiates APCCS' obligation to remit the proceeds of suit to it. Since APCCS, as an assignee, is the owner of the claim, in such a circumstance it becomes entitled to retain those proceeds."). The lower courts have addressed the standing issue in this case on the *assumption* that the aggregators must pass back to PSPs all proceeds of the litigation, and this Court may properly address the question presented on the same assumption. To the extent, however, that petitioners wish this Court to treat it as *established fact* that respondent aggregators must pass back to PSPs all proceeds of litigation—*e.g.*, Pet. Br. 6 ("the aggregators stand to gain or lose nothing from the lawsuit, no matter how it is resolved")—their position is factually inaccurate.

2. Respondents sued AT&T in 1999. AT&T asserted, among other things, counterclaims against respondents for alleged overpayments to the PSPs. Although petitioners now lament that they could "only

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briefing submitted in *C&W*. In her opinion in which she explained her decision to certify *AT&T* for interlocutory appeal (Pet. App. 64-82), Judge Huvelle cited *C&W* six times. In the accompanying certification order, she certified *all three* cases, not just *AT&T* and *Sprint*. Pet. App. 81-82. C&W was not a party to the D.C. Circuit appeal only because it entered bankruptcy. Despite all those facts, petitioners moved to strike references to the Jaeger Declaration at pages 18-19 of respondents' D.C. Circuit brief, taking the position that the court of appeals could consider only materials before Judge Huvelle in the *Sprint* and *AT&T* cases, not the parallel *C&W* case simultaneously certified for interlocutory appeal. The D.C. Circuit decided the appeal and then in an order dated June 29, 2005, dismissed the motion to strike as moot.

name the aggregators (rather than the payphone operators) as counterclaim defendants" (Pet. Br. 8), at no time did petitioners attempt to interplead the PSPs, join them as necessary parties to the litigation, or bring separate lawsuits against them.

Judge Huvelle appointed a Special Master to oversee discovery, which proceeded with nothing more than the squabbles typical of civil litigation. Petitioners sought disclosure of documents in the PSPs' possession. Although they artfully word their brief to suggest that the assignments prevented them from getting it—"*Respondents took the position that* the operators themselves were immune from party discovery because they were not participating in the suit" (Pet. Br. 8) (emphasis added)—in truth the Special Master ordered the aggregators to collect discovery from the PSPs, which they did. See Special Master Mem. Op. & Order No. 5 (Aug. 31, 2002) (holding that PSPs are under aggregators' control for discovery purposes).

C. Decisions Below

1. After four years of litigation, AT&T moved to dismiss on the ground that some plaintiffs lacked standing. JA160-178. The district court first granted the motion (JA313) but, on reconsideration, concluded that all respondents have standing. Pet. App. 83-106. The court relied on "a long line of cases and legal treatises that recognize a well-established principle that assignees for collection purposes are entitled to bring suit where the assignments transfer absolute title to the claims." *Id.* at 90. As we explained above, respondent aggregators hold such assignments.[3]

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[3] At least three of the six respondents have additional interests in the compensation and therefore have standing without regard to

The district court also rejected petitioners' position that the assignments were invalid under state law. The district court held that federal—not state—law controlled the validity of the assignments, and that petitioners had not shown them to be invalid under federal law. Pet. App. 104-105.

The district court certified for interlocutory appeal the question whether the aggregator respondents have standing and the separate question—raised by petitioner Sprint in a lawsuit initiated in 2001 and later consolidated for purposes of appeal—whether there is a private cause of action to enforce the FCC regulations. Pet. App. 45-63.

2. A motions panel of the D.C. Circuit accepted the case for interlocutory appeal. Pet. App. 42-44 (Rogers, Tatel & Roberts, JJ.). The motions panel reminded the parties that, under *Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199, 204-205 (1996), they could raise on appeal *any* issue presented in the district court's September 3 and December 17 orders (Pet. App. 83-106, 45-63). Despite that invitation, petitioners refrained from challenging the district court's conclusion that the assignments are valid. But see Pet. Br. 22 (criticizing court of appeals for assuming the validity of the assignments without any discussion and asserting—despite having lost this issue in the district court and failed to raise it in the court of appeals—that "[t]hat is a state law question, and the court of appeals offered no explana-

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whether assignees have standing. Pet. App. 10 n.**. Petitioners nevertheless assert that they challenge the standing of two of those three respondents. Pet. Br. 4-5 n.1. This point—like numerous others (see note 16, *infra*)—should be taken up on remand in the event this Court agrees with petitioners' basic contention that assignees-for-collection lack standing.

tion for its apparent assumption that the assignments effectively transferred legal title to the operators' claims").

A merits panel (Ginsburg, C.J., & Sentelle & Randolph, JJ.) then split three ways, with two differently constituted majorities holding that respondents have standing but that there is no private cause of action. Pet. App. 4-41. Judge Sentelle dissented with respect to standing. Chief Judge Ginsburg dissented with respect to a private cause of action based on 47 U.S.C. § 201(b).

In upholding the standing of respondent assignees, the majority observed that "[t]he assignments at issue here * * * transfer to the assignees the entire interest of the PSPs in their dial-around compensation claims." Pet. App. 14. And "[c]ourts and commentators agree that, if an assignment properly transfers ownership of a claim, then the assignee's interest 'is not affected by the parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought on the claim.'" Pet. App. 14-15 (quoting *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997)).

The majority acknowledged that some of the authorities on which it relied addressed the question of who is the "real party in interest" for purposes of FED. R. CIV. P. 17(a). It also acknowledged that the proposition that standing and real-party-in-interest inquiries sometimes diverge is "true enough, as far as it goes." Pet. App. 15. "But standing also depends in part, as does a plaintiff's status as the real party in interest, upon having 'a personal interest in the controversy.'" *Ibid.* (quoting *Whelan* v. *Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992)). The Rule 17 cases indisputably establish that respon-

dents have a personal interest in the controversy as a result of the assignments. And the D.C. Circuit saw "no basis for distinguishing the personal stake required under Rule 17(a) from the interest required for standing." Pet. App. 16.

At no point did the D.C. Circuit suggest that Rule 17 *confers* standing on respondents. Rather, courts *interpreting* Rule 17 have had to grapple with the same question—albeit under a different source of law—that is presented by this case, namely whether an assignee-for-collection has a "personal stake" in the controversy. What was relevant was not the Rule itself, but rather the *unanimous* conclusion of every court ever to consider the question that assignees-for-collection *do* have the requisite stake.

3. After this Court decided *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, *supra*, it was clear that Chief Judge Ginsburg's dissent had been correct and that the D.C. Circuit majority had been wrong to conclude that no private right of action existed. Following a remand from this Court, 127 S. Ct. 2094 (2007), the D.C. Circuit therefore affirmed the district court in its entirety. Pet. App. 1-3.

4. Following remand to the district court, the aggregators moved for leave to amend the complaint to reflect that certain PSPs' failure to make the required payments had, in fact, triggered the aggregators' contingent rights to retain litigation proceeds. See *Motion for Leave to Amend Consolidated Amended Complaint*, filed in Civil Action No. 1:99 CV 696 (ESH) (Jan. 10, 2008). Because this Court had granted certiorari, however, Judge Huvelle denied the motion to amend with-

out prejudice. Minute Order, Civil Action No. 1:99 CV 696 (ESH) (Jan. 29, 2008).

SUMMARY OF ARGUMENT

I. Both courts below held that the assignments irrevocably transfer the PSPs' claims to respondents. Petitioners assert in their brief many propositions contrary to those holdings. This Court should not even consider those fact-bound arguments, but in any event every one of them is wrong. Because—contrary to petitioners' misrepresentation—the assignment and the agreement to return proceeds are *separate* agreements, any hypothetical dispute about the adequacy of respondents' performance of their contractual duties cannot affect petitioners; it would give rise only to a contractual dispute between a PSP and respondents and could not upset the finality of a resolution of a PSP's claim against petitioners.

II. Assignees-for-collection who—like respondents—hold *title* to assigned claims have always had standing. The reasoning of *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), disposes of petitioners' arguments to the contrary. "[T]he assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773. The bounty that the *qui tam* relator in *Vermont Agency* sought was not helpful to his standing; rather, "the *United States'* injury in fact suffice[d] to confer standing" on the relator. *Id.* at 774 (emphasis added).

Here, as in *Vermont Agency*, history and long tradition also confirm respondents' standing. Blackstone's treatise published in 1766, the Judiciary Act of 1789, and other sources make it clear that assignees had standing at the time of the Framing. Assignees-for-collection have been recognized as proper plaintiffs in

cases and commentaries dating from, for example, 1904, 1920, and 1925—including an article by noted proceduralist and future Judge Charles E. Clark. These cases and commentaries can no more be disregarded—on the ground that they fail to address "modern" standing doctrine—than the cases on which this Court relied in *Vermont Agency*, which suffered the same "defect." Equally important, petitioners cite no case in which a court has *ever* held that an assignee-for-collection with legal title is an improper plaintiff merely because of what it intends to do with the proceeds of litigation.

No recognized rationale for the standing doctrine justifies denying standing to assignees-for-collection. Assignees-for-collection do not assert a generalized grievance. There is no reason for concern about the absence of concrete adverseness. Separation-of-powers concerns *support* standing when the defendant is not a governmental actor and the cause of action is based on a statute and agency regulations.

Petitioners get it backward when they argue that respondents are trying to evade limitations on associational standing and class actions. The traditional device of an assignment for collection is a vastly superior—and far better established—alternative to associational standing and class actions, both of which were first recognized long after the Framing and have proved controversial.

III. Petitioners mislead this Court when they suggest that they have been unable to obtain discovery from individual PSPs. The Special Master ordered such discovery. If petitioners are dissatisfied with the result, they should take their dissatisfaction up with the Special Master, who has ample tools to manage the

ordinary discovery disputes at issue. In addition, the information necessary to prove liability and damages is already in petitioners' possession; their claims that they need discovery available only from PSPs, and that the participation of individual PSPs is necessary to prove damages, are false.

Petitioners also use scare tactics when they lament their inability to pursue counterclaims against PSPs. Petitioners have never even tried to implead PSPs or join them as necessary parties.

ARGUMENT

Because petitioners—contradicting *every* judge who considered this case below—thoroughly misrepresent the documents by which respondents were assigned the claims at issue and separately promised to account for litigation proceeds to the PSP, it is necessary to address those factual misrepresentations (Point I below). We then explain (Point II) that this Court has rejected petitioners' position in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), *Titus* v. *Wallick*, 306 U.S. 282 (1939), and *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117 (1920), and that historical practice overwhelmingly supports the ability of assignees—including assignees-for-collection—to sue in federal court. Indeed, petitioners have *not one case* to the contrary. Finally, we address petitioners' and *amici*'s unpersuasive case-specific arguments (Point III).

I. RESPONDENTS WERE GIVEN ALL RIGHTS, TITLE, AND INTEREST IN THE CLAIMS IN THIS CASE

The district court concluded that "the assignments currently before the Court, which purport to transfer

ownership of the right to collect, give plaintiffs legal title to the dial-around-compensation claims." Pet. App. 94. Petitioners briefed at length on appeal their disagreements with that conclusion. The D.C. Circuit thus considered petitioners' arguments that "the assignments did not transfer the PSPs' compensation claims to the aggregators." Pet. App. 11. The court rejected those arguments. Pet. App. 11-13. Under the two-courts rule, this Court ordinarily would not revisit the fact-bound question of the completeness of the assignment. See *Graver Tank & Mfg. Co.* v. *Linde*, 336 U.S. 271, 275 (1949).

Nevertheless, petitioners in this Court attempt to show that the assignments are something other than the complete and irrevocable transfer of ownership that both courts below held them to be. Petitioners' arguments are wrong.

A. The Terms Of The Assignments Are Clear And Unequivocal

Petitioners distort the record by ascribing to "the assignment" provisions that are not contained in the APOA, the agreement that transfers the claims and control of litigation from the PSPs to the aggregators. See, *e.g.*, Br. 27 ("There is only one assignment, and it contains interlocking promises, not distinct ones.").

In fact, the APOA is set forth in its entirety from Pet. App. 114 through the signature block on Pet. App. 116. Although it is not clear from petitioners' appendix, the subsequent Compensation Agreement is, in fact, an entirely separate document from the APOA and does not purport to qualify or modify it.[4]

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[4] See note 1, *supra*. In many instances, PSPs signed the APOA and Compensation Agreement days or weeks apart.

The terms of the APOA are unequivocal. It provides that the PSP assigns to the aggregator "for purposes of collection *all rights, title and interest* of the Company in the Company's claims, demands or causes of action for 'Dial-Around Compensation.'" Pet. App. 114 (emphasis added). Beyond that, it emphasizes two key points:

First, the PSPs "agree[] to be bound by final determinations in court or regulatory proceedings prosecuted by APCCS in the [PSP's] interest." Pet. App. 115 ¶ 2. The PSPs likewise "agree[] to be bound by any settlement, compromise or release reached by APCCS on its behalf and that any document executed in connection with any such settlement, compromise or release by APCCS on behalf of the [PSP] shall be binding on the [PSP]." *Id.* ¶ 3.

Second, the assignments are irrevocable by the PSPs because they cannot be revoked "without the written consent of the attorney-in-fact," *i.e.*, the aggregator. *Id.* ¶ 4.

The APOA says nothing more; as business contracts go, it is a model of simplicity and clarity. But petitioners argue that the phrase "for purposes of collection" somehow negates any language that follows (Br. 35); that, contractual terms notwithstanding, PSPs might "disavow or attempt to avoid the binding effect of any judgment entered on the claims" (Br. 46); and that the PSPs can "take their supposedly assigned claims back at any time they choose just by discontinuing payment of the litigation fees" (Br. 36), even though the APOA says *nothing* about payment of fees. Each of those suggestions is meritless.

B. Under The Assignments, The Aggregators Possess Unfettered Legal Title To Claims And Proceeds And Possess Plenary Authority Over The Litigation

The APOA transfers "for purposes of collection all rights, title and interest of the Company in the Company's claims, demands or causes of action for 'Dial-Around Compensation.'" Pet. App. 114. Petitioners, however, submit that the assignment "transferred only the right 'of collection'" and thus constitutes in effect "nothing more than a contract for legal services." Br. 35. They are wrong in multiple ways.

1. Respondents Possess Plenary Authority Over The Litigation

Petitioners suggest that, by inserting the phrase "for purposes of collection" before the transfer of unfettered title and interest in the claims, respondents qualified or perhaps even nullified that transfer. But, as the D.C. Circuit observed, the phrase "certainly does not affect the validity of the assignment of the PSP's dial-around compensation claim." Pet. App. 12; accord *Titus* v. *Wallick*, 306 U.S. 282, 288 (1939).

According to petitioners, the APOA transfers only the "right 'of collection.'" Br. 35. But the phrase "right of collection" appears nowhere in the APOA—the transfer is of "all rights, title and interest"—and this distinction is hardly cosmetic.

Petitioners contend that the APOA takes back with one hand what it gives with the other. For example, the APOA states that PSPs "agree[] to be bound" by "final determinations in court or regulatory proceedings prosecuted by APCCS in the Company's

interest" as well as "any settlement, compromise or release reached by APCCS on its behalf." Pet. App. 115. Yet petitioners submit that the phrase "in the Company's interest" "raise[es] the specter" of PSPs disavowing final dispositions on the ground that the aggregators did not act "in [their] interest." Br. 47. Petitioners speak of specters because they are unable to point to a single attempt by a PSP to disavow a settlement. *Amici* note that aggregators have filed "hundreds of complaints" and "settl[ed] scores" of lawsuits involving claims assigned by PSPs. NetworkIP Br. 7. But no PSP has even advanced petitioners' argument, because the phrase "in the company's interest" does not mean what petitioners contend. Far from being a loophole, the phrase "determinations * * * prosecuted in the [PSP's] interest" merely clarifies to each individual PSP that no determination of claims that *other* PSPs assigned will affect the disposition of claims that *it* assigned; rather, only a determination of a claim prosecuted "in *the [PSP's]* interest"—as opposed to "*a [PSP's]* interest"—will bind that PSP.

Equally tenuous is petitioners' resort to phrases in the *Compensation Agreement* to argue that PSPs can disavow dispositions of claims assigned in the APOA. See Br. 47-48 (arguing that "[t]he accompanying documents" require aggregators to exercise "reasonable discretion" and take only "reasonably necessary and appropriate" measures to collect on assigned claims). Even if petitioners were correct about the language in the Compensation Agreement, an aggregator's breach of that agreement would merely give rise to a lawsuit by the PSP *against the aggregator* for breach of contract. A breach of the Compensation Agreement could not possibly render the disposition of a claim transferred in the independent, unconditional APOA any less

final or binding. Respondents, *not* petitioners, would be on the hook if there were any valid reason to question the adequacy of respondents' performance.

2. Respondents Have Legal Title To Litigation Proceeds And—Vis-à-Vis Petitioners—Legal Authority To Direct Proceeds As They See Fit

Just as respondents' collateral commitments to PSPs to act "reasonably" in prosecuting claims do not undermine respondents' legal title to the claims, their collateral agreements to remit litigation proceeds do not negate their legal title to the proceeds. In each case, there are two independently enforceable agreements: the APOA, which gives respondents "all rights, title and interest" in the claims and proceeds, and the Compensation Agreement, in which respondents make certain promises to the PSPs. Thus, if respondents collect on the assigned claims to which they have "all rights, title and interest," they own the proceeds as well and—at least vis-à-vis petitioners—have legal authority to dispose of those proceeds as they see fit. If respondents were to give the proceeds to charity, *the PSPs* would have a promising breach-of-contract claim against them. But the contract breached would not be the APOA, and petitioners are not third-party beneficiaries of the *separate* Compensation Agreement. How respondents direct the proceeds is a contractual matter between them and the PSPs.

Because respondents have legal title to litigation proceeds, they are situated no differently from an *original* owner of a claim who signs a collateral agreement with a charity obligating herself to donate every penny she recovers in litigation. As petitioners acknowledge,

the charitable pledge alone cannot deprive the claim's owner of standing. Br. 31. In each situation, the party bringing suit has legal title over the claim, injury, and proceeds, but another party ultimately stands to benefit by the amount collected and has contractual recourse against the legal owner of the claim and proceeds.

C. The Assignments Are Irrevocable

No judge below agreed with petitioners' tired allegation that the PSPs can revoke the assignments. Yet petitioners persist. Br. 36. They recount that, "[i]f at any point [the aggregator] is no longer representing [the operator] in the litigation, [the operator] will be able to pursue [its] claims on [its] own, should it so choose." Br. 7 (quoting Pet. App. 127). They splice that quotation together with one from the previous page of the relevant document, which states that, if a PSP fails to pay litigation proceeds, "[the aggregator] will drop that [service provider] from the plaintiff's list and will have no obligation to represent the [service provider] in the collection of these claims." *Ibid.* (quoting Pet. App. 126).

The document petitioners are quoting is not the APOA or even the Compensation Agreement. Instead, it is the *cover letter* that accompanied the litigation packets sent to the PSPs. That fact is critical because the APOA does not mention litigation funding *at all*, much less provide that a PSP may revoke its assignment by ceasing to contribute. Quite the opposite, the APOA says the assignment "*may not be revoked* without the written consent of the attorney-in-fact." Pet. App. 115 (emphasis added).

The cover letter (which was never signed by any PSP) cannot change the plain terms of the APOA. But in addition it says nothing close to what petitioners

claim. In explaining the funding requirements contained in the Compensation Agreement, the letter states that, if a PSP ceases to meet its funding commitment, APCCS will have "no *obligation* to represent" it going forward. Pet. App. 126 (emphasis added). On the next page, in discussing the meaning of the APOA, it explains, "[i]f at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose." Pet. App. 127. Neither of these statements—which were made with respect to different documents—obligates an aggregator to return a claim to a PSP. The D.C. Circuit made short work of petitioners' forced logic:

> The possibility that APCCS would no longer represent a PSP in litigation does nothing * * * to suggest the PSP could revoke the assignment as long as APCCS continues to represent the PSP in the litigation. Of course, APCCS itself could repudiate the assignment * * * [but] the assignment itself is plain: the PSP may not revoke it without the consent of the aggregator.

Pet. App. 12.

The Jaeger Declaration (see note 2, *supra*) further undermines petitioners' reading of the cover letter. She explains that "APCCS and the PSPs contemplated that any such termination, if allowed, would operate prospectively only, *i.e.*, as to claims for unpaid compensation that had not yet accrued and, therefore, were not encompassed by an ongoing suit. It is these **prospective** claims as to which APCCS would not be representing the PSP that the PSP will be able to pursue on its own, should it so choose." Jaeger Decl. ¶ 9 (July 15, 2003). And the amended complaint respondents sought to file in January 2008 made clear that

they in fact *have not* returned the claims of the PSPs that have ceased to fund litigation, but instead will retain the proceeds of those forfeited claims to use as they see fit.

II. ASSIGNEES-FOR-COLLECTION HAVE STANDING WHEN THEY HAVE BEEN ASSIGNED TITLE TO THE CLAIMS

"Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 102 (1998)). This case is preceded by a long tradition of suits by assignees-for-collection to recover monetary damages arising from commercial transactions. Federal courts have entertained innumerable cases of this kind. Petitioners are unable to cite *any* case holding that an assignee that owns legal title to a claim lacks standing to assert that claim because of what it plans to do with the proceeds. There is no good reason to depart from this long tradition.

A. The Reasoning Of *Vermont Agency* Shows That Assignees' Standing Does Not Depend On Their Intended Use Of Proceeds

In *Vermont Agency*, this Court held that Article III's standing requirements were satisfied when a private party sued under the False Claims Act to seek a remedy for an injury suffered by the United States. The Court found an "adequate basis" for the relator's standing in "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the

assignor." 529 U.S. at 773. That principle also controls this case.

Petitioners try to distinguish this case from *Vermont Agency* by arguing that the relator in that case intended to keep whatever bounty he recovered, whereas respondent aggregators intend to return damages won in this case to the assignors. Petitioners assert that *Vermont Agency* "held that the bounty the *qui tam* relator receives if the suit is successful gives the relator the 'concrete private interest in the outcome of the suit' required for Article III standing." Br. 24 (citation omitted). Petitioners argue that the relator's interest in the bounty was essential to the relator's injury in fact and redressability. *Id.* at 24-25, 36-37. But *Vermont Agency* said exactly the *opposite*.

The standing issue in *Vermont Agency* arose because this Court, after granting certiorari on a different question, ordered supplemental briefing on the question "Does a private person have standing under Article III to litigate claims of fraud upon the government?" 528 U.S. 1015 (1999).

Petitioner Vermont Agency of Natural Resources (VANR) in its supplemental brief argued against standing and made many of the same arguments petitioners in the present case now make.

- Quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975), VANR argued that "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." 1999 WL 1101312, at *4. VANR regarded that proposition as dispositive against standing—just as peti-

tioners in the present case do. See Pet. Br. 24-25.

- Citing among other cases *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d at 17, and *Titus* v. *Wallick*, 306 U.S. 282, 289 (1939), VANR argued that "the relator cannot claim standing based on an assignment of the Federal Government's right of action." 1999 WL 1101312, at *7.

In one key respect, however, VANR advanced the exact opposite of the proposition petitioners now endorse.

- VANR disdained the notion that the *qui tam* relator's bounty could support standing: "a by-product of litigation such as an interest in a bounty is not injury in fact." *Id.* at *3. Now, however, petitioners say that "redressability through the bounty" was "critical to the Court's opinion" in favor of standing. Pet. Br. 25.

The Court *accepted* VANR's argument—which petitioners contradict in the present case—that the bounty could play no role in supporting standing. But the Court *rejected* VANR's first two arguments—the ones petitioners repeat in the present case.

The first relevant paragraph of the Court's opinion rejected the United States' argument as *amicus* that "the damages and penalties awarded in a successful *qui tam* action (of which the relator is entitled by law to recover a share) are not a 'byproduct' of the suit." 1999 WL 1086464, at *9 n.6. With respect to the bounty, the Court agreed entirely with VANR's contrary position:

> There is no doubt, of course, that as to this portion of the recovery—the bounty he will receive

> if the suit is successful—a *qui tam* relator has a "concrete private interest in the outcome of [the] suit." But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion—indeed, the "right" he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. As we have held in another context, however, an interest that is merely a "byproduct" of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.

529 U.S. at 772-773 (citations and footnote omitted).

The Court thus discussed the bounty *only* to *reject* it as a basis for standing. But cf. Pet. Br. 26 (asserting that the Court had "no reason to discuss" the bounty unless the Court was relying on it to support standing). The first sentence of the paragraph advances only the proposition that the bounty meets the literal wording of some of the Court's prior opinions. The remainder of the paragraph, however, begins with the word "But" and explains in detail why that fact is unhelpful to a *qui tam* relator's standing.

That is why the next paragraph—which upholds standing on a *different* basis—begins with a sentence containing the word "however." The United States argued in its supplemental brief that *qui tam* provi-

sions could be regarded as assignments of claims. 1999 WL 1086464, at *9-*10 (citing *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d at 17; *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117, 134-135 (1920); and *Titus* v. *Wallick*, 306 U.S. at 288-289). As noted above, VANR argued the contrary. On this point, unlike the bounty, the Court sided with the United States:

> We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits—and also suits by subrogees, who have been described as "equitable assign[ees]." We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

529 U.S. at 773-774 (citations and footnote omitted). The Court went on to say that its conclusion was "confirmed" by long tradition (*id.* at 774).

As to injury in fact, then, the Court's conclusion was *not*, as petitioners imply, that the relator suffered a violation of his right to receive a bounty. It was, instead, that "the *United States' injury in fact* suffices to confer standing" on the relator. 529 U.S. at 774 (emphasis added).

That was true despite the general principle that "'Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*."

529 U.S. at 771 (quoting and adding emphasis to *Warth* v. *Seldin*, 422 U.S. at 499). The relator's standing to assert someone else's injury in fact "is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773. This "representational standing" provided "adequate basis" for the relator's suit because the United States had standing to sue. *Ibid.* Here, respondents have standing to sue because the assignors had standing to sue, whether or not respondents retain a "bounty."

Vermont Agency also made clear that the bounty had no bearing on the redressability of the alleged injury. The Court defined redressability as "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." 529 U.S. at 771. As that definition indicates, redressability has nothing to do with what a plaintiff intends to do with his recovery; it concerns the relationship between the injury in fact that the plaintiff alleges and the judicial action that the plaintiff seeks. For example, in *Steel Co.*, this Court held that reimbursement of the costs incurred by the plaintiff to investigate and prosecute a suit dealt with "a byproduct of the litigation itself" but would not redress the deprivation of information that constituted the injury in fact. 523 U.S. at 107. Reimbursement "would assuredly benefit" the plaintiff. *Ibid.* But "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Ibid.*

Vermont Agency applied the same analysis to the relator's bounty. Contrary to petitioners' claim (Br. 24-25) the Court did *not* indicate that the redressability requirement was satisfied by the bounty. Citing *Steel Co.*—a case that was *only* about redressability (*Steel*

Co., 523 U.S. at 105 (declining to address injury in fact because complaint failed redressability test))—the Court described the bounty as a byproduct of the suit. *Vermont Agency*, 529 U.S. at 773.

Vermont Agency reiterated that standing exists in cases "'of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vermont Agency*, 529 U.S. at 774 (quoting *Steel Co.*, 523 U.S. at 102). The Court explained that it had "routinely entertained" suits by assignees asserting claims that originally belonged to assignors. The Court also recounted the tradition of *qui tam* actions in which courts heard cases brought by informers "even if they had not suffered an injury themselves." *Id.* at 775. Every assignee or *qui tam* case the Court cited was decided without discussion of "standing" in the Article III sense, or of what petitioners describe (Br. 38) as "modern" Article III jurisprudence. The Court nevertheless described the tradition of such suits, combined with the theoretical justifications for assignee standing, as "well nigh conclusive" (529 U.S. at 777).

Vermont Agency's "assignment" analysis, thus, is dispositive in respondents' favor. But here, as in *Vermont Agency*, the Court's holding that assignees have standing can also be "confirmed" by history and long tradition.

B. Assignees-for-Collection Have A Long History Of Being Allowed To Pursue Claims In Federal Court

Suits by assignees, including those who intend to pass back recoveries to the assignors, are cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process. Such suits have long been litigated in federal courts, including this Court.

Federal courts have consistently rejected arguments that such assignees could not sue because they lacked the requisite interest in the claims or in the damages they sought. Petitioners offer only unpersuasive arguments that the history of these cases should be ignored. And they cite *no* decision holding that assignees-for-collection lack Article III standing. The cases on which they rely address entirely different questions.

1. Federal Courts Have Routinely Entertained Suits By Assignees-For-Collection

Petitioners argue that "there is no * * * tradition and practice of standing by assignees for collection." Br. 37. They are wrong.

The right of assignees to sue was well established when the Constitution was ratified. In 1766, Blackstone wrote of a time when "no chose in action could be assigned or granted over * * *. But this nicety is now disregarded * * *." II BLACKSTONE COMMENTARIES, ch. 30 at 442. The Judiciary Act of 1789, enacted by First Congress, acknowledged the practice of suits by assignees. See 1 Stat. 73, 79 (1789). Edmund Randolph, the first Attorney General, rendered two opinions in 1791 recognizing the rights of assignees. See Hon. Edmund Randolph, *Interest on Certificates for 1791*, 1 U.S. Op. Atty. Gen. 17, 17 (1791) (holder of certificates "or his assigns" entitled to rights flowing from the paper); Hon. Edmund Randolph, *Commissioners of the Bank of the United States*, 1 U.S. Op. Atty. Gen. 19, 23 (1791).

This Court has repeatedly recognized the power of assignees to sue. *See, e.g.*, *Turner* v. *Bank of North Am.*, 4 U.S. (4 Dall.) 8, 10 (1799) (interpreting Section 11 of

the Judiciary Act of 1789 in the context of a suit by an assignee); *Welch* v. *Mandeville*, 14 U.S. (1 Wheat.) 233, 236-237 & n. (1816) (Story, J.) (recognizing the adoption by common law courts of chancery rules—which followed the earlier civil law tradition reflected in the Romanic and Napoleonic codes—permitting assignment of choses in action); *Sheldon* v. *Sill*, 49 U.S. 441, 449-450 (1850) (same); *Deshler* v. *Dodge*, 57 U.S. 622, 631 (1853) (interpreting the Judiciary Act of 1789); *Shoecraft* v. *Trustees of Internal Improvement Fund*, 124 U.S. 730, 735-736 (1888) ("standing in court to ask [for] enforcement" of a contract the same in the hands of assignee as it would be for the assignor); *Ambler* v. *Eppinger*, 137 U.S. 480, 482 (1890) (interpreting the Judiciary Act of 1887 by reference to earlier interpretation of the Judiciary Act of 1789).

Assignments accompanied by an agreement to return a judgment to the assignor also have a long history. By the early 20th century, the ability of assignees-for-collection to bring suits was regarded as well established. Pomeroy's treatise described as "settled by a great preponderance of authority" that an assignee was entitled to sue if "the entire legal title vests in the assignee, [notwithstanding] any contemporaneous collateral agreement by virtue of which he is to receive a part only of the proceeds and is to account to the assignor or other person for the residue, or even is to thus account for the whole proceeds." JOHN NORTON POMEROY, CODE REMEDIES § 70, at 96 (4th ed. 1904). To the same effect, future Judge Charles E. Clark wrote: "an assignee who has no beneficial interest, like an assignee for collection only, may prosecute an action in his own name, and many, probably most, American jurisdictions have so held." Charles E. Clark & Robert M. Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 264 (1925).

This Court entered judgments in favor of assignees-for-collection in *Spiller* and *Titus*. *Spiller* reversed a court of appeals holding that the assignee-for-collection could not recover reparations for injury suffered by the assignors. The assignments "vest[ed] the legal title in Spiller. What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award of reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments." *Spiller*, 253 U.S. at 134. *Titus*, likewise, held that an assignee-for-collection could recover damages on the basis of an assignment that transferred "dominion over the claim for purposes of suit. In that respect its legal effect was not curtailed by the recital that the assignment was for purposes of suit and that its proceeds were to be turned over or accounted for to another." *Titus*, 306 U.S. at 289.[5]

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[5] What may have been this Court's first encounter with an assignee-for-collection came even earlier, in *Williams* v. *Nottawa*, a case involving bonds "transferred * * * simply for the purpose of collection." 104 U.S. 209, 210 (1881). In that case, a Michigan citizen assigned claims to an Indiana citizen, who then invoked diversity jurisdiction to sue a Michigan defendant. The Court in *Nottawa* rejected that attempt to manufacture diversity jurisdiction; the Court applied the principle, first codified in the Judiciary Act of 1789, that an assignee could not sue in federal court unless the court would have jurisdiction to hear the claim "if no assignment had been made." *Ibid.* But there is no suggestion in *Nottawa*, or in the Judiciary Act of 1789, that an assignee-for-collection could *never* sue in federal court because there could be no case or controversy. See also *Waite* v. *City of Santa Cruz*, 184 U.S. 302, 325 (1902) (federal court would have jurisdiction "if the only objection to the jurisdiction of the circuit court is that the plaintiff was invested with the legal title * * * simply for purposes of collection").

Lower courts, too, have frequently entertained suits by assignees-for-collection. "[I]t is commonplace for individual persons claiming antitrust injury to assign their claims to an association formed for the specific purpose of pursuing litigation." *Gulfstream III Associates, Inc.* v. *Gulfstream Aerospace Corp.*, 995 F.2d 425, 437 (3d Cir. 1993) (Greenberg, J., concurring). See also *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Labs.*, 460 U.S. 150 (1983) (trade association of retail pharmacists pursued Robinson-Patman Act claims as assignee of claims of its individual members); *Chiropractic Coop Ass'n* v. *American Medical Ass'n*, 867 F.2d 270 (6th Cir. 1989) (association brought monopolization claims assigned to it by individual chiropractors); *Hahn* v. *Oregon Physicians' Service*, 786 F.2d 1353 (9th Cir. 1985) (podiatrists formed corporation to which they assigned antitrust claims); *Klamath-Lake Pharmaceutical Ass'n* v. *Klamath Medical Service Bureau*, 701 F.2d 1276, 1282 (9th Cir. 1983) (pharmacies assigned claims to an association but "retained their interest in the outcome of the litigation"); *In re Fine Paper Litig.*, 632 F.2d 1081, 1090 (3d Cir. 1980) (citing cases); *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1207-1208 (9th Cir. 1975).

The consistent holdings that lawsuits by assignees-for-collection may proceed have been acknowledged by standard modern treatises. See 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1545 (2d ed. 1990); 6 Am. Jur. 2d *Assignments* § 184; 6A C.J.S. *Assignments* § 109. If petitioners are right, however, then the treatise writers as well as all federal judges ever to address assignee-for-collection cases have missed a glaring Article III deficiency. That position is neither

plausible nor consistent with this Court's recognition that routine entertainment of particular kinds of suits by the federal courts is itself probative of Article III standing, whether or not each decision discusses Article III principles.

2. *Titus*, *Spiller*, And Real-Party-In-Interest Cases Are Relevant To Standing

Petitioners argue that these cases are irrelevant and should be ignored, but they advance only unpersuasive reasons to ignore them.

a. As to *Titus* and *Spiller*, petitioners argue that this Court had no reason to concern itself with the standing of an assignee-for-collection because Titus and Spiller were suing to enforce judgments that had been entered in their own names, not judgments that had been entered for someone else and assigned to them. Br. 40-41. That is nonsense *under petitioners' own theory*. It is true that neither case presented the question whether the plaintiff had Article III standing in the proceeding in which the original judgment was entered—a case filed in state court in *Titus*, and a case filed before a federal agency in *Spiller*. But Article III jurisdiction was required in both cases to invoke the power of federal courts *to review or enforce the judgments*. Both Titus and Spiller were asking a federal court to enter a judgment in their favor, even though the damages they would recover had been pledged to someone else. If petitioners' theory is correct, Titus and Spiller lacked standing to ask a federal court to act, because they would have obtained no redress from a federal court judgment in their favor.

b. Petitioners also ask the Court to ignore the many cases holding that assignees-for-collection have

a personal interest in a case, whenever such holdings are cast in the rubric of "real party in interest." Petitioners try to dismiss these cases by creating, and then tearing down, a straw man. Contrary to petitioners' suggestion (Br. 42-43), respondents have never argued that Federal Rule of Civil Procedure 17 was, itself, a source of federal jurisdiction, or that Congress, by enacting or modifying Rule 17, could somehow override Article III limitations. Respondents' and the D.C. Circuit's position is that, even though Rule 17 and Article III standing requirements sometimes diverge, they often ask the same question, *i.e.*, whether the plaintiff has "'a personal interest in the controversy.'" Pet. App. 15 (quoting *Whelan* v. *Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992)).

Real-party-in-interest rules are rooted in the distinction between law and equity—a distinction that produced the rules (long since discarded) that obligees and assignees of a chose in action could sue, but must do so in the name of the assignor. See Hon. William Wirt, *The Saline Bank of Virginia*, 1 U.S. Op. Atty. Gen. 214, 216 (1818) (describing common law rule that "suits are necessarily brought in the name of the obligee or payee, for the use and benefit of the real owner of the debt: so the nominal plaintiff is one person, and *the real plaintiff in interest* is another") (emphasis in original). Real-party-in-interest rules discarded the "cumbersome procedures" that were a relic of that distinction, and "simply provided that actions should be prosecuted in the name of 'the real party in interest.'" 6A WRIGHT, MILLER & KANE, *supra*, § 1541, at 320. "At common law, the assignee of a chose in action did not hold legal title to it and * * * in large measure the real party in interest concept developed as a means of eliminating this restrictive rule. Under present law an

assignment passes the title to the assignee so that he is the owner of any claim * * * and should be treated as the real party in interest * * *." *Id.* § 1545, at 346. Thus, the real party in interest is the owner of legal title to the claim, *i.e.*, the assignee, "even [if] the assignee must account to the assignor for whatever is recovered in the action." 6A WRIGHT, MILLER & KANE, *supra*, § 1545, at 348.

Rule 17 addresses the question of which party is entitled to sue in a broad range of situations involving intangible rights, interests, and duties. It addresses assignments, subrogation, trustees, guardians, bailees, third-party beneficiaries of contracts, and many others. Pursuant to well-developed legal principles, many parties (*e.g.*, trustees and guardians) are permitted to sue because of injuries suffered by another party, to seek a remedy that will benefit another party, or both. The identity of the "real party in interest" often turns on the nature and breadth of intangible property rights, including such questions as what "rights" to the "ownership" of a "chose in action" are transferred in an "assignment."

Real-party-in-interest decisions are highly relevant to (even if not *always* dispositive of) standing issues for two reasons. First, such decisions are ultimately based on a judgment about the scope and nature of the legal rights (especially intangible property rights) on which a claim is based. For that reason, Rule 17 decisions shed light on whether the plaintiff is asserting "legal rights, the invasion of which creates standing." *Warth* v. *Seldin*, 422 U.S. at 500. Real-party-in-interest decisions reflect judgments concerning the nature of rights that can properly be claimed by the party before the court. See 6A WRIGHT, MILLER & KANE, *supra*, § 1543.

Second, the large body of decisions holding that an assignee-for-collection is the real party in interest is, itself, support for the proposition that suits by such assignees are cases and controversies. That is especially true given the historical roots of the real-party-in-interest doctrine and, in particular, its relation to the rights of assignees to sue. See Clark & Hutchins, *supra*, 34 YALE L.J. at 259-273 (describing history of assignability of choses in action and real-party-in-interest statutes). A large body of law, developed over centuries for the purpose of deciding whether and in what circumstances assignees can sue, certainly bears on whether such suits have been "traditionally amenable to, and resolved by, the judicial process."

c. Petitioners also argue that all of the assignee-for-collection cases are "drive-by jurisdictional rulings" that should be given no effect, especially because they antedate "modern" standing jurisprudence. Br. 38. That argument is wrong for many reasons.

First, federal courts have a responsibility to examine the basis for jurisdiction, even if no party has questioned it. Jurisdictional defects are sometimes overlooked, but petitioners' argument assumes blindness to supposed jurisdictional defects on a massive scale. It assumes that every litigant to contest the ability of an assignee-for-collection to sue, every treatise writer, and every court to address a suit by an assignee-for-collection (including this Court) has missed an Article III defect and asked the wrong legal questions, even while focusing on the very fact that the assignee had agreed to return the proceeds of suit to the assignor.

It is one thing to ignore a single case in which a jurisdictional defect might have been overlooked. It is another thing entirely to disregard a long tradition of

allowing lawsuits with particular characteristics, and to impute to scores of jurists and litigants and scholars an inability to recognize the absence of a case or controversy. That is not this Court's approach. In *Vermont Agency*, this Court placed weight on cases in which the resolution of a jurisdictional issue had been implicit rather than explicit. 529 U.S. at 773-774 (discussing cases this Court has "routinely entertained").

Second, petitioners offer no explanation why "modern" standing jurisprudence should require dismissal after federal courts, over the course of many decades, have exercised jurisdiction in such cases. *Titus* was decided in 1939, the same year Justice Frankfurter explained that under Article III "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (concurring opinion). It is presumptuous for petitioners to assert that the Court of 1939 failed to take authentic standing principles into account when it decided *Titus*. If "modern" standing principles required a different result from that reached in *Titus* and similar cases—which they do not—that would be a reason to question "modern" standing principles, not a reason to question *Titus*.

3. No Authority Supports Petitioners' Contention That Assignees-For-Collection Lack Standing

Petitioners cannot cite one decision holding that assignees-for-collection lack standing to assert claims for which they hold legal title because of what they

intend to do with the proceeds. Instead, petitioners rely on cases that address entirely different issues.

a. The "redressability" cases cited by petitioners are especially wide of the mark. The redressability component of standing doctrine asks whether the remedy a plaintiff seeks will redress the injury in fact that the plaintiff alleges. For example, civil penalties payable to the government might promote an undifferentiated public interest in law enforcement (which is *not* a cognizable injury in fact), but do not provide compensation for a plaintiff's injuries from a prior failure to provide information. *Steel Co.*, 523 U.S. at 106-107. Revoking a hospital's nonprofit tax status would not remedy a plaintiff's lack of access to medical care. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-43 (1976). Criminal prosecution of a father would not remedy a failure to receive child support payments. *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 618 (1973). *Every* redressability case cited by petitioners involved such a mismatch between injury alleged and remedy sought. This case involves no such mismatch; an injury in fact arising from a defendant's failure to pay compensation is directly redressed by an order requiring such payment.

No case cited by petitioner even hints that the redressability of an injury depends on what the plaintiff plans to do with any recovery. And making redressability turn on that fact would deny standing in cases that courts have traditionally entertained.

For example, in one of this Court's early landmarks on the scope of judicial power, *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), the Attorney General was permitted to sue on behalf of William Hayburn, who was seeking a pension. Of more current interest,

petitioners' redressability theory would deny standing to trustees who seek a recovery that will be transferred to, and inure to the sole benefit of, the trust and its beneficiaries. The principle would therefore have broad ramifications for the law of trusts and estates, bankruptcy, and ERISA, in which trustees routinely sue for damages that are pledged to another party. It could also undermine arrangements for the securitization of financial assets. Securitization may be accomplished, for example, when the original owner of a financial asset (*e.g.*, a bank that has lent money for a home mortgage, or a business that has accounts receivable) transfers the asset (the mortgage or the accounts receivable) to a trust or other legal entity, which in turn issues securities backed by the asset. This entity retains legal ownership of the underlying financial asset, but the purchasers of the securities will have a beneficial interest in any payments received from the debtors. See, *e.g.*, 1 JASON H.P. KRAVITT, SECURITIZATION OF FINANCIAL ASSETS § 4.02[B] (2d ed. 2002) (describing legal structure of securitization). If a debtor defaults and is sued (by the entity that owns the claim for payment, but has transferred a beneficial interest in the payment to the purchasers of the securities), petitioners' theory would preclude standing to recover money owed by the debtor.

b. Petitioners also rely on cases that define limitations on federal jurisdiction *other than* the case-or-controversy limitation. To the extent those cases are relevant, they support respondents, not petitioners. *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883), *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387 (1938), *Woodside* v. *Beckham*, 216 U.S. 117 (1910), and other cases cited by petitioners (Br. 28-31) stand for the unremarkable proposition that limitations on this

Court's original jurisdiction, and limitations arising from the Eleventh Amendment, diversity, and amount-in-controversy requirements, cannot be evaded by transferring claims. If (as in this case) the assignor had a claim that it could have enforced in federal court, the claim can still be enforced in federal court by an assignee that acquires legal title to the claim. If the assignor could not have enforced the claim in the federal court in which suit was initiated (as in the cases cited above), that defect cannot be remedied by transferring title to the claim to an assignee.

More important, however, these cases demonstrate the long tradition of assignments for collection. Surveying all of these cases—and the cases they in turn cite (see, *e.g.*, cases cited in *Woodside*, 216 U.S. at 121)—one cannot find even a *hint* that a suit by an assignee-for-collection might not be a case or controversy, even though each of these cases was *about* federal jurisdiction.

C. None of the Recognized Rationales For The Standing Doctrine Justifies Denying Standing To Assignees-For-Collection, As Either A Prudential Or A Constitutional Matter

None of the recognized rationales for the standing doctrine provides any reason to depart from the established principle that assignees-for-collection may sue in federal court. To the contrary, every rationale strongly *supports* standing in this case.

Respondents are not asserting a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth* v. *Seldin*, 422 U.S. at 499. In this case, there can be no concern that a federal court is being asked to serve as a "publicly funded

forum[] for the ventilation of public grievances or the refinement of jurisprudential understanding." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). This case is about hard cash. The judgment sought will be based on concrete events, so "a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." *Id.* at 472.

There is no reason for concern about the absence of "concrete adverseness which sharpens the presentation of issues." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). It makes no sense to suggest that there is any meaningful distinction, in ways that matter for standing, between the interests of respondents in this litigation and the interests of the PSPs. That congruence is a reflection of the long-standing business relationships between respondent aggregators and the PSPs before the litigation commenced; the continuing business relationships between them; the assignments; the mutual obligations of the parties that are contained in the separate contractual relationships; and their mutual financial interests in collecting compensation that is owed. Respondents have a genuine stake in this litigation, and so do the PSPs. Respondents' interests are more than sufficient to ensure concrete adversity, as petitioners well know. The nine years respondents have now litigated against AT&T, just to obtain recognition of the right to litigate the merits, bespeak concrete adverseness in full measure.

Allowing this case to proceed does not implicate any concern about separation of powers. Respondents sue not to *challenge* legislation or agency action, but to *fulfill* the mandate of Congress that PSPs be compen-

sated and to *effectuate* the FCC's remedial scheme. As we have explained, this is the precisely the kind of dispute that courts have traditionally resolved. There is no risk that resolution of this case would intrude on matters the Constitution reserves for the legislative or executive branches.

As we explain below, the assignments for collection provide a fair and efficient method—indeed, the *most* fair and efficient method, and for many PSPs the *only* method—to implement and enforce the congressional command that payphone operators must be compensated. The practical effect of a holding that respondents lack standing would be that many PSPs would not receive the compensation that Congress commanded. In this case, a proper respect for the constitutional prerogatives of the political branches counsels strongly *in favor of* permitting cases of this kind to be heard and resolved in federal court.

D. Respondents' Use Of A Traditional Form Of Litigation Is Not An End Run Around The Protections Of Relatively Recent Innovations Such As Class Actions And Associational Standing

Petitioners assert that allowing this action to proceed based on assignments for collection evades "the limits that this Court has imposed on associational standing" (Br. 52 (emphasis and capitalization altered)), and evades class-action protections as well (Br. 54-57). Petitioners have it exactly backward. Litigation by an assignee-for-collection is a long-recognized and efficient form of litigation. Actions brought in a representative capacity by associations, and actions brought in a representative capacity as class actions,

are extraordinarily controversial innovations of relatively recent vintage.

1. Standing for an association to represent the rights of its members, when it has suffered no injury in its own right, appears to have first been recognized by this Court in *National Motor Freight Traffic Ass'n* v. *United States*, 372 U.S. 246 (1963). Two decades later, the Solicitor General urged this Court to "reconsider the doctrine of representative standing." Br. for the Respondent, 1986 WL 728213, at *9, *International Union, United Automobile Workers* v. *Brock*, 477 U.S. 274 (1986) (No. 84-1777). According to the United States, "most of the Court's decisions on representative standing are not of longstanding effect." *Id.* at *36 n.35. And "[c]ourts and commentators ha[d] begin to note the inadequacies of and limitations on the doctrine of representative standing." *Id.* at *37 n.36. Among other problems, an association "might lack authorization from its members to proceed on their behalf (indeed, it may not have notified them of the suit at all) or exceed the scope of its authority." *Id.* at *39.

The problems with the doctrine of associational standing are wholly absent when an assignee sues, because assignors have *voluntarily and expressly* assigned to it all right, title, and interest in their claims. That is why Judge Bork indicated that associational standing should be disallowed in an action for money damages *precisely because* "the association's members could" instead "assign it their rights." *Telecommunications Research & Action Center* v. *Allnet Communications Services, Inc.*, 806 F.2d 1093, 1098 (D.C. Cir. 1986) (concurring opinion). Assignee standing is not an evasion of limitations on, but a *vastly* superior alternative to, associational standing.

2. Three years ago, an official of the United States Chamber of Commerce remarked that "the American class action system has turned into a litigation 'business' designed to squeeze money out of companies whether or not those companies have really done anything wrong." Remarks by Stanton D. Anderson, Paris Class Action Conference (Apr. 13, 2005).[6] In a concurrent poll of the business community, 84 percent of businesses described class action reform as an "extremely high" or "very high" priority. See U.S. Chamber of Commerce 2005-2006 National Business Agenda at 4.[7] In light of that consensus, it is difficult to take seriously petitioners' purported dismay that cases like the present one might "frustrate" "[t]he careful calibration of the Rule 23 class action mechanism" (Br. 56). Their explanation is no more convincing.

Rule 23's certification process safeguards the rights of both defendants and absent class members. But there *are* no absent "class members"; the only claims at issue in this case are those pertaining to compensation of PSPs that have *affirmatively and voluntarily* assigned their claims to respondents. And petitioners do not identify any way in which they have fewer rights than they would have in a class action—the PSPs are bound by any final judgment or settlement, and the Special Master has determined that, for discovery purposes, respondents possess any documents the PSPs possess. In fact, petitioners would be entitled to far *less* discovery in a class action, where

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[6] Available at http://www.uschamber.com/press/speeches/2005/050413ParisClassActionConference.htm.

[7] Available at http://www.uschamber.com/NR/rdonlyres/eozchhhftscl7qgxsektgbhlmzwerwz7hiaunujhkf7jkn5gf4gxzllvrlrasivzw2gihrqns7ysuazm3xar7ttzzwe/2005-2006_NBA_Report.pdf.

only the named plaintiffs would be compelled to respond to discovery requests.

Furthermore, the IXCs have successfully urged the FCC to create rules that *ensure* that individual PSPs lack sufficient information to prosecute their own claims. See pp. 51-52, *infra*. Because that is so, it is far from certain that an individual PSP or small group of them could effectively prosecute the case if named representative plaintiff. Aggregators are the only entities capable of prosecuting suits like this one, but Qwest, at least, has made clear that it would oppose on typicality grounds any effort to certify a class with an aggregator as representative plaintiff. Qwest Br. 18.[8]

There is, in short, no reason to believe that the class-action device is a good way to pursue the PSPs' claims, no reason to believe it would afford petitioners any protection they now lack, and no reason why the availability of this controversial device, first adopted

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[8] It is ironic that Qwest, which argues here that the assignments are insufficient to confer standing on the aggregators, argued in the district court in a related case that the assignments deprived the PSPs themselves of standing to prosecute the claims at issue in their own names. On June 30, 2003, strictly as a protective measure, six PSPs that had assigned their claims to the aggregators filed a putative class action on behalf of the 1400 PSPs whose claims are at issue here. *D&B Telephones, Inc., et al.* v. *Qwest Communications Corp.*, C.A. No. 03-1443 (D.D.C.). Qwest moved to dismiss the action for lack of subject-matter jurisdiction on the theory that the assignments deprived the PSPs of standing. The district court dismissed the action without prejudice and with leave to reinstate in the event of an adverse decision here. Qwest is appealing and arguing that the dismissal should have been with prejudice. Qwest earlier in that action opposed a motion for class certification, which the PSPs filed only after Qwest successfully opposed a motion to stay the action until the aggregators' standing was finally resolved.

with the Federal Rules of Civil Procedure approximately 150 years after the Constitution was ratified, should play any role in the standing analysis.

III. THERE ARE NO CASE-SPECIFIC REASONS TO DENY RESPONDENTS STANDING

Petitioners and *amici* claim they face practical challenges in lawsuits for dial-around compensation to which PSPs are not formal parties. They protest that discovery is difficult and that they cannot bring counterclaims against the PSPs. But the discovery problems are staggeringly exaggerated if not wholly invented, and petitioners have full ability to pursue any legitimate counterclaims.

A. Ordinary Discovery Disputes Are Not A Reason to Deny Standing, And The Courts Below Are Capable Of Resolving The Disputes In This Case

Just as petitioners' arguments about Article III standing turn in large part on erroneous descriptions of the APOA and Compensation Agreement, their prudential-standing arguments regarding the discovery difficulties and the need for individualized proof from PSPs are overstated and detached from reality.

1. Petitioners' and *Amici*'s Alleged Difficulties With Discovery Are Overstated And Easily Handled By Trial Courts

a. First, it is simply not true that petitioners are hamstrung by lack of discovery from individual PSPs, because they *have received discovery from individual PSPs*. The Compensation Agreements clearly state that "PSP will promptly provide APCCS with all documentation that APCCS or its counsel reasonably believes to

be necessary in order to pursue collection of PSP's DAC Claims." Pet. App. 118. When respondents resisted petitioners' discovery requests on the ground that individual PSPs were not parties to the suit, petitioners moved to compel and the Special Master sided with petitioners, reasoning that the Compensation Agreement renders PSPs' documents under respondents' control. See *APCC Servs., Inc.*, v. *AT&T Corp.*, No. 1:99cv00696 (D.D.C. July 31, 2002) (Memorandum Opinion and Order No. 5). He ordered respondents to gather various types of discovery from the PSPs, which respondents have made and are making every effort to do.

Qwest labels this effort a "[c]reative, informal solution[]" to discovery, and terms it "a complete failure" because many PSPs "seemed uninterested in or incapable of providing full and complete responses." Qwest Br. 12, 13. In civil litigation, however, there is nothing at all exotic about filing motions to compel discovery responses, and nothing unusual about having either side be unsatisfied with the results of discovery requests. Indeed, there is no reason to believe that the PSPs' responses are atypical—but, even if they were, the proper course would be to take the issue up with the Special Master, who has vast discretion to craft remedies for problems as routine as discovery squabbles. It will not do for petitioners to write off the entire structure of civil litigation as inadequate merely because they claim (opportunistically) to be frustrated. As the Special Master's Order No. 5 aptly illustrates, federal trial judges are more than up to this task.

b. Because the Special Master has decided that respondents are in control of documents the PSPs possess, Qwest's speculative horror about having to

serve 1400 subpoenas on scattered PSPs will never be more than hypothetical.

If there were a "next case," however—or if the Special Master had turned down petitioners' motion to compel—petitioners would hardly be left without options. At no point did they attempt to interplead the individual PSPs or join them as necessary parties, either of which they might have considered had they thought the game worth the candle. And, if petitioners' nightmare scenario did come to pass and they elected to serve 1400 subpoenas, that is still considerably less effort than it would take to litigate separate cases in each of those 1400 locations. What petitioners know, of course—but will never say—is that their strategic calculus does *not* involve choosing between a single suit involving 1400 subpoenas and 1400 scattered cases with a single subpoena each. Instead, they recognize the reality that, if these cases cannot be brought together, the vast majority will never be brought at all. As Qwest candidly acknowledges, "[t]he [PSPs] are typically small companies, doing business in limited localities." Qwest Br. 12. Such small companies generally would not (for financial reasons) and often could not (for technological reasons) file suit alone.[9] Petitioners' suggestion that the PSPs merely "lack motiva-

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[9] Contrary to petitioners' argument that there is no barrier to a PSP's bringing its own suit (Br. 49-50), analysis of AT&T's call tracking systems has necessitated review of 500,000 documents, with many of the most relevant documents still missing. See Memorandum of Law in Support of Plaintiffs' Amended Motion to Compel (pending), filed Jan. 27, 2003, in *APCCS* v. *AT&T*. In addition, an AT&T database containing billions of call records must be searched to account for calls from PSPs' phones. See AT&T's Revised Opposition to Plaintiffs' Amended Motion to Compel (filed Oct. 24, 2007). It is disingenuous to suggest that this could be done in 1400 separate lawsuits or by PSPs with as few as 1-5 payphones.

tion" to sue (Br. 50) cannot be taken seriously, particularly given their efforts supporting nine years of this litigation.

2. The Information Necessary To Prove Liability And Damages Is Already In Petitioners' Possession

a. After years of considering how best to effect Congress's goal of "promot[ing] the widespread deployment of payphone services to the benefit of the general public" (47 U.S.C. § 276(b)(1)), the FCC declined to require PSPs to keep track of the calls and decided that "[i]t is *the responsibility of each carrier* to whom a compensable call from a payphone is routed to track, or arrange for the tracking of, each such call so that *it* may accurately compute the compensation required." 47 C.F.R. § 64.1310(a) (1997) (emphasis added); *First Payphone Order*, 11 F.C.C.R. at 20,590 (¶ 97).[10] Thus, the IXCs—not the PSPs—are responsible for tracking dial-around calls from payphones, and that is how the IXCs wanted it: In comments on the 1996 NPRM, Sprint, among others, argued that "only IXCs can track calls to completion."[11]

The FCC agreed with the IXCs that they are best positioned to track dial-around payphone calls. Indeed, it observed that PSPs are *unable* to do so because "it is technically infeasible for the PSP automatically to receive information about the reseller, including the iden-

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[10] See also *Bell Atlantic-Delaware, Inc.* v. *Frontier Communications Services, Inc.*, Mem. Op. & Order, 16 F.C.C.R. 8112, 8118 (¶ 13) (2001) (reaffirming that the 1996 rule "places tracking and compensation obligations squarely on the [IXCs]").

[11] *First Payphone Order*, 11 F.C.C.R. at 20,588 (¶ 91).

tity of the reseller, whether the carrier has passed ANI information [see JA36] to the reseller, and whether a call was in fact completed by a given reseller."[12] Because individual PSPs are dependent on call data that reside with IXCs, FCC rules provide that the IXC that completes the call is responsible for compensating the PSP,[13] and impose on IXCs various reporting requirements that are designed to provide PSPs with some modicum of information about dial-around calls placed from their phones. See 47 C.F.R. § 64.1310.

b. Given that the IXCs are responsible for tracking dial-around calls, reporting them to PSPs, and compensating PSPs for them—and that PSPs are technologically *incapable* of tracking the calls to completion themselves—it is unlikely that critical facts are known to PSPs that are not known to the IXCs. Qwest suggests four categories of material facts that PSPs possess but aggregators do not, and argues that IXCs are thereby prejudiced by lawsuits for dial-around compensation to which individual PSPs are not parties. Upon inspection, however, none of those categories makes much sense.

First, Qwest claims that IXCs need to know whether "[t]he phone line from which a call is made is actually connected to a payphone." Qwest Br. 7. Such information is already provided to the IXC. FCC rules require payphone lines to be specifically identified. Each calendar quarter, the aggregators provide the IXCs with the PSPs' lists of payphone lines, and the

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[12] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Order on Reconsideration, 16 F.C.C.R. 8098, 8105 (¶ 15) (2001).

[13] *First Payphone Order*, 11 F.C.C.R. at 19,983 (¶ 19).

local-exchange carriers (LECs) verify each line and also provide their verified lists to IXCs.[14] Thus, before payments are due, the IXCs already know which lines are connected to payphones.

Second, and relatedly, Qwest contends that "[t]he payphone owner [must] request[] that its [LEC] * * * identify the phone line as a payphone line to the IXC." Qwest Br. 8. However, as just explained, that happens already outside the litigation process. In any event, it is the IXC's—not the PSP's—obligation to request the actual transmission of payphone coding digits by the LEC and to ensure that they are transmitted.[15]

Third, Qwest submits that, before it pays compensation, an IXC must know that "no other carrier has a contract to pay compensation for the call." Qwest Br. 8. Again, this information would likely be known to the IXC, and is *not* likely to be known to the PSP. As explained above, FCC rules are quite clear about which carrier is responsible for tracking dial-around calls and compensating PSPs. If the responsible IXC has entered into a contract with another IXC to shift responsibility for compensating certain calls, the contracting IXCs should be aware of their own arrangement. Breakdowns in communication may happen—Qwest offers but one example, in a footnote, where one of its carrier-customers agreed with a PSP to pay what Qwest would have owed but somehow did not tell Qwest (Qwest Br. 9 n.10)—but the problem is hardly of such gravity as

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[14] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 F.C.C.R. 4998, 5018 (¶ 33) (Common Carrier Bureau 1998) ("PSP payphones must be on LEC payphones lines * * * to be eligible for per-call compensation").

[15] *Id.* at 5020 (¶ 37).

would warrant denial of prudential standing. In any event, aggregators play a critical role in keeping track of these contracts on PSPs' behalf, so IXCs are unlikely to be prejudiced by getting discovery from aggregators.

Fourth, Qwest claims it must be sure that "[t]he payphone operator has not agreed by contract to waive the compensation from a particular IXC." Qwest Br. 8. But these contracts would almost always involve the carrier itself, which would be contracting out of its default obligation to pay under FCC rules. In the unusual circumstance that a PSP gives a waiver to one of the IXC's sales agents, the IXC would still likely find out. In exchange for the waiver, the PSP would typically be given favorable rates for routing coin traffic or operator calls through the agent to the IXC. What is more, if the IXC were to make payments to the PSP (in ignorance of the waiver its agent had executed), it would reduce the agent's commission by the amount it was unnecessarily paying the PSP. The agent would thus have every motivation to inform the IXC of the waiver.

APCC Servs., Inc. v. *NetworkIP, LLC*, 22 F.C.C.R. 4286 (2007), demonstrates that it is entirely possible to litigate a case of this sort based on information in the carriers' possession. The FCC required NetworkIP to use data in its possession to calculate damages, and the task was accomplished with relative ease—and without the participation of individual PSPs. Moreover, there was no information the PSPs could have provided that the defendant carrier wanted that was not available from the aggregators. Real experience—as opposed to petitioners' and *amici*'s speculation—demonstrates that there is no genuine practical problem with litigation in this form.

B. Recognizing Respondents' Standing Does Not Deprive Petitioners Of Appropriate Means To Pursue Any Legitimate Counterclaims They May Have

Petitioners and *amici* note that they have asserted counterclaims to recover alleged overpayments made to PSPs and express concern that, because the PSPs did not expressly assign *liabilities* to respondents in the APOA—and because the PSPs are not formal parties to this lawsuit—the PSPs might disavow judgments on the counterclaims and leave petitioners unable to collect. Pet. Br. 47; Qwest Br. 14-16. Their concerns are groundless.

a. The data relating to the alleged overpayments the IXCs made to PSPs reside in precisely the same IXC servers as the data relating to the underpayments respondents allege. Thus, for the same reason that the IXCs have all the data necessary to *defend* against respondents' claims, they have the data necessary to *prosecute* counterclaims for overpayment. It would be a relatively straightforward matter to set off any overpayments against the payments owed on the assigned claims.

b. It is true that, because the PSPs are not parties to the litigation over assigned claims, IXCs who seek compensation beyond set-offs for overpayments made to PSPs might have to sue them to collect it. But petitioners have known that throughout the nine years this litigation has been pending, and have failed to attempt to invoke any of the procedural devices potentially available to compel the PSPs to participate in the suit. Most obviously, petitioners might have

attempted to interplead the PSPs under FED. R. CIV. P. 22 or join them under FED. R. CIV. P. 19. See 6A WRIGHT, MILLER & KANE, *supra*, § 1545, at 353 ("In practice, when defendant is faced with an action by only one of the parties to whom he ultimately may be liable, he may move to join the absent person * * *."). Any uncertainty about whether these strategies would have succeeded exists only because petitioners never even attempted them.[16]

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[16] If the Court concludes that respondents lack standing as assignees-for-collection, it should remand the case to allow the courts below to consider whether respondents have standing in their own right or can proceed with this lawsuit in modified form. (1) The aggregators have always made it clear that they will return to delinquent PSPs (if anything) the *future* value of their claims, and will keep proceeds that have accrued through the time the claim is returned. See Declaration of Ruth Jaeger ¶¶ 8-9, *quoted at* pp. 8-9 & 23, *supra*. What was once merely likely has since become reality: Some PSPs have dropped out of the litigation effort, and the aggregators have not returned their claims. See pp. 13-14, *supra* (discussing January 2008 motion to amend). Respondents thus have standing even under petitioners' view of the case. If the Court determines that respondents lack standing as assignees-for-collection, it should remand to permit the district court to consider respondents' motion to amend. (2) In the district court, respondents argued in the alternative that they had associational standing to pursue the assigned claims. The district court initially rejected that argument in the course of holding that respondents lack standing. JA307-312. When it reconsidered and vacated that opinion, however, it did not address associational standing. The D.C. Circuit upheld standing without addressing associational standing, which respondents briefed in that court. If the Court holds that the assignments are insufficient to support standing, it should remand to allow the lower courts to consider associational standing. (3) Finally, if necessary, the Court should remand to let the lower courts consider whether to permit respondents to posture their claims in a different fashion, either by adding the PSPs as formal parties or pursuing class certification. Respondents sought leave to pursue both avenues in the district court after that court initially

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2008

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dismissed the aggregators' complaints but before the court reversed itself on reconsideration.

ADDENDUM

ASSIGNMENT AND POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that Cogcte Call, Inc., a Kansas (corporation/partnership/proprietorship), hereinafter referred to as the "Company", hereby assigns, transfers and sets over to APCC Services, Inc. ("APCCS") (or APCCS' assignee) for purposes of collection all rights, title and interest of the Company in the Company's claims, demands or causes of action for "Dial-Around Compensation" ("DAC") due the Company for periods since October 1, 1997, pursuant to Federal Communications Commission rules, regulations and orders. Further, the Company hereby appoints APPCS as its true and lawful attorney-in-fact for the purpose of exercising the following powers:

1. To do all acts necessary for the purpose of collecting DAC due the Company for periods since October 1, 1997.

2. To enter into any discussions or other activities on behalf of the Company in connection with attempting to resolve such DAC claims, including, without limitation, selecting and retaining legal counsel, and filing and prosecuting court or regulatory proceedings in the Company's interest. The Company agrees to be bound by final determinations in court or regulatory proceedings prosecuted by APCCS in the Company's interest.

3. To sign, on behalf of the Company, settlement agreements, releases, or other documents relating to the settlement of DAC claims. Company hereby agrees to be bound by any settlement, compromise or release reached by APCCS on its behalf and that any document executed in connection with any such settlement, compromise or release by APCCS on behalf of the Company shall be binding on the Company.

4. Company specifically acknowledges and confirms that no person or entity who shall pay to APCCS (or its assignee) amounts relating in any way to DAC owed to the Company shall be liable to Company to the extent of any amounts so paid, unless the person or entity making such payment has actual knowledge that the authority granted to APCCS by this Assignment and Power of Attorney has been properly revoked. This Assignment and Power of Attorney (which is coupled with an interest) may not be revoked without the written consent of the attorney-in-fact.

IN WITNESS WHEREOF, Company has caused this Assignment and Power of Attorney to be executed and delivered by a duly authorized officer of the Company, to be effective this 11 day of February, 1999.

Cogcte Call, Inc
Company

ATTEST:

By: Vicki H. Lindgren
Its: Vice President

By: David Lindgren
Its: President

AP98295

AMENDMENT TO
APCC SERVICES AGENCY COMPENSATION AGREEMENT

PSP: _____ Federal Tax ID: _____

Address: _____ Authorized Contact: _____

_____

Telephone: _____ Fax: _____

WHEREAS, APCC Services, Inc. ("APCCS") and PSP have entered into an APCC Services Agency Compensation Agreement ("Agreement"), under which APCCS is PSP's exclusive agent for billing and collection of "Dial-Around Compensation" ("DAC"); and

WHEREAS, there are DAC payments owed by telecommunications carriers as a result of the miscounting and undercounting of calls or simply a failure or refusal to pay, which APCCS has not been able to resolve by routine dispute resolution processing and PSP wishes APCCS to take further action to collect the unpaid DAC (hereinafter referred to as "DAC Claims"); and

WHEREAS, APCCS wishes to act as PSP's exclusive agent for resolving DAC Claims and the parties recognize the efficiencies of APCCS taking collective action on behalf of PSP and other independent payphone service providers with similar claims; and

WHEREAS, in order to take quick, effective, and efficient collection action, APCCS will be required to exercise broad reasonable discretion in making collective decisions on behalf of PSP and other payphone service providers.

NOW, THEREFORE, be it agreed that the Agreement is amended as follows:

1. All capitalized terms and abbreviations not defined in this Amendment shall have the meanings set forth in the Agreement.

2. PSP appoints APCCS as its exclusive agent for collection of PSP's DAC Claims which relate to periods since October 1, 1997 and which have not been paid.

3. APCCS will take such action as it deems reasonably necessary and appropriate to collect payment of PSP's DAC Claims, which may include collective legal action such as filing complaints at the FCC or in court on behalf of PSP and other payphone service providers.

4. APCCS is authorized to take any reasonable step on PSP's behalf to collect payment for the DAC Claims, including, without limitation, selecting and retaining legal counsel, filing and prosecuting legal complaints in PSP's name against any or all carriers withholding payments and/or other parties, and entering settlements of some or all DAC Claims with one or more parties, without obtaining further oral or written authorization from PSP. PSP will accept APCCS's reasonable determinations as to what actions are necessary and appropriate to cost-effectively collect payment of the DAC Claims.

5. APCCS will provide general information to PSP from time to time as to the progress of APCCS's overall collection effort for DAC Claims. However, APCCS is not required to inform PSP in advance of any particular measure taken on PSP's behalf or to provide information on legal strategy.

6. PSP will promptly provide APCCS with all documentation that APCCS or its counsel reasonably believes to be necessary in order to pursue collection of PSP's DAC Claims.

7. APCCS is authorized, in the reasonable exercise of its discretion, to agree to a settlement of some or all of PSP's DAC Claims, which may include one or more lump sum settlements that will be apportioned among PSP and other payphone service providers on whose behalf APCCS enters into such settlements. PSP understands that such settlements may preclude any further claim by PSP for the amounts in dispute.

8. For the additional services to be provided by APCCS over and above the services provided pursuant to the Agreement, PSP agrees to and specifically authorizes APCCS to make a deduction from PSP's DAC payments in an amount necessary to fund PSP's share of the activities described above to collect DAC Claims on behalf of PSP. The initial amount of the deduction will be:

> $.007 on the first 50,000 dial around calls paid in the quarterly remittance, plus
> $.006 on the next 900,000 dial around calls paid in the quarterly remittance, plus
> $.005 on the next 550,000 dial around calls paid in the quarterly remittance, plus
> $.004 on the next 1,000,000 dial around calls paid in the quarterly remittance, plus $.003 on any remaining calls.

Quarterly deductions will be capped at $20,000, except in the case of subsequent business combinations for which special conditions may apply requiring additional contributions in excess of the stated cap.

PSP understands that funding requirements will be reevaluated quarterly and agrees that the above level of deduction may be increased or decreased as necessary to provide funding adequate to carry out the above-described activities. In the event that PSP chooses not to meet the funding requirements or PSP terminates the Agreement, APCCS will be relieved of any further obligation to represent PSP in the collection of PSP's DAC Claims and APCCS will have no obligation to remit to PSP any amounts previously deducted from PSP's DAC payments.

APCCS agrees that if it recovers attorneys fees and/or costs in connection with any lawsuit APCCS may bring to collect PSP's DAC Claims, it will remit such recoveries to PSP in

amounts reflecting PSP's proportionate share of the funding for such lawsuit provided by all payphone service providers.

9. Except as amended, the Agreement remains in effect. This Amendment is subject to the "Terms and Conditions" attached to the Agreement, each of which is incorporated herein by reference, except to the extent that such "Terms and Conditions" are amended herein. If the Agreement is not renewed, this Amendment remains in effect.

IN WITNESS WHEREOF, and of the "Terms and Conditions" hereof, the undersigned have entered into this Amendment to the APCC Services Compensation Agreement effective this ____ day of _____, 1999.

PSP	APCC Services, Inc.
Company Name: _____	
By: _____	By: _____
Title: _____	Title: _____

The Assignment and Power of Attorney and the Dial Around Compensation Billing Data Sheet attached to this Amendment must be signed and returned with this Amendment. Please return executed documents to:

APCC Services, Inc.
10306 Eaton Place
Suite 520
Fairfax, VA 22030
(703) 385-5301 - fax

REPLY BRIEF

(10)

No. 07-552

IN THE

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P.
& AT&T CORP.,

Petitioners,

v.

APCC SERVICES, INC. *et al.*,

Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

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April 9, 2008

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INTRODUCTION

The question presented in this case is straightforward. Do plaintiffs who have been assigned claims *only* "for purposes of collection" have standing to bring federal district court damages actions on behalf of third parties who are fully capable of bringing suit themselves? The answer is no. Such claims are barred by Article III as well as by settled principles of prudential standing.

First, it is axiomatic that Article III requires a plaintiff to have a personal stake in the outcome of litigation it initiates. Respondents do not dispute that Article III bars suits by agents who are obliged to remit the proceeds of litigation to their principals. In contending that they have Article III standing, respondents are reduced to arguing that they are not such mere collection agents and must be deemed the owners of the PSPs' claims because the "assignment" and the obligation to remit proceeds to the PSPs were purportedly contained in separate contracts.

But respondents' "two contract" theory is legally and factually baseless and was rejected by both lower courts. Equally misguided is respondents' reliance on *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), which does not remotely support Article III standing for assignees-for-collection-only. Respondents' related historical arguments fare no better. There was no tradition of such suits at the time of the framing of the Constitution, and the only assignments this Court has ever held sufficient to confer Article III standing are complete or partial assignments of entire claims, including the right of recovery. When this Court has addressed assignments-for-collection-

only, it has stated that the assignee has no interest in the outcome of the lawsuit.

Second, whether or not there is Article III standing, settled principles of prudential standing bar this lawsuit. Respondents admit that individual PSPs are fully capable of suing in their own names, and respondents have not advanced a single legitimate reason why this action was not jointly brought by the 1400 PSPs – with respondents acting as the PSPs' attorney and witness, not as a "plaintiff-for-hire" collection agent.

Had respondents proceeded in this way, there would have been no issues about petitioners' entitlement to discovery, no impediments to asserting and litigating counterclaims, no risk that individual PSPs could later claim not to be bound by the judgment, and no possibility that the nominal plaintiffs who brought this action would be unable to develop the facts required to litigate individualized damages claims on behalf of 1400 absent third parties. But all these problems arise when claims are brought by assignees-for-collection-only. It is for this reason that this Court has held that, absent contrary direction by Congress, damages suits cannot be brought on behalf of third parties in circumstances like these.

I. RESPONDENTS LACK ARTICLE III STANDING.

As respondents state, "[t]his case is about hard cash." Resp. Br. 43. Their problem is that there is not a penny in this litigation for respondents. Respondents have brought their action against petitioners solely on behalf of 1400 absent PSPs, and respondents conceded below that they are required to channel any cash received from petitioners into the

hands of these PSPs.[1] As respondents candidly state, this lawsuit is merely an extension of the preexisting agency relationship in which respondents have acted as "aggregators" who are responsible for "tracking dial-around compensation owed by inter-exchange

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[1] Respondents assert in their brief (at 8-9) that they have "a contingent interest" in the outcome of the case because, if a PSP hypothetically ceased funding the litigation, respondents would claim the right to keep the proceeds of that PSP's claim. But, when the factual issues relevant to standing were litigated in the district court below, respondents made no such argument, and they also made no such claim in their brief in opposition to certiorari in this Court. Rather, the first time this claim was raised in the district court in this case was when respondents moved to amend their complaint to add that allegation *after* certiorari was granted. For this reason, the district court then held that, even if this claim were meritorious and were relevant to respondents' standing, it has been waived. *See* Tr. of Hr'g at 51-54, *APCC Servs. v. AT&T Corp.*, No. 99-696 (D.D.C. Jan. 28, 2008); *see also* Sup. Ct. R. 15.2.

In any event, the argument lacks merit. The letter accompanying the assignment explains that, if a PSP ceases contributing to the litigation fund, the PSP will be withdrawn as a plaintiff and may pursue *its* claims on its own. Pet. App. 126 ("If a PSP refuses to permit the above deductions or withdraws his/her agreement to allow these deductions prior to conclusion of the suits, APCCS will drop that PSP from the plaintiff's list and will have no obligation to represent the PSP ...."). Respondents rest their contrary position on the unsubstantiated assertion of a single APCC officer set forth in a declaration that is not part of the record in this case, Resp. Br. 8, and which, as the district judge made clear, is contrary to the position respondents took in this case.

Finally, respondents concede that this new allegation has no pertinence to this Court's review. They acknowledge that the lower courts decided the case on the "assumption" that respondents must "pass back to PSPs all proceeds of the litigation" and this Court "may properly" decide this case on the same assumption. *Id.* at 9 (emphasis omitted).

carriers (IXCs) and collecting it on behalf of PSPs." *Id.* at 1.[2] These are concessions by respondents that they are mere collection agents with no personal stake in this litigation.

But time and again, this Court has held that Article III requires that the plaintiff have a "personal stake in the outcome" of his suit. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962); see Pet. Br. 18-21. Unless principles of associational standing are met – and they are not here, Pet. Br. 52-53 – a plaintiff cannot bring suit solely to redress injuries to absent third parties. A plaintiff has suffered no "redressable" injury, and hence lacks constitutional standing to sue, if he does not seek to protect his own interests, *Warth* v. *Seldin*, 422 U.S. 490, 515-16 (1975), and does not "stand to profit in some personal interest" from the litigation, *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976). *Accord Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 616-17 (1973).

As this Court has held, the requirement that a plaintiff have a "personal stake in the outcome of the controversy" is essential to ensure "concrete adverseness" between the parties, thereby "sharpen[ing] the presentation of issues upon which the court so largely depends for illumination." *Baker*, 369 U.S. at 204. By contrast, if lawsuits could be brought by mere agents of the claimant, the court would not have before it those whose interests are

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[2] Contrary to respondents' suggestion, Resp. Br. 4, it is because aggregators have this contractual role that AT&T has insisted that it deal with them in resolving disputed bills. But that is irrelevant to the question of who must bring collection lawsuits.

most directly affected and who will be the most committed and engaged advocates. Similarly, the defendant will be denied the opportunity to confront its true accuser. See Pet. Br. 46-48.

Respondents do not dispute these fundamental principles.[3] Indeed, they appear to acknowledge that Article III denies standing to a plaintiff who has been assigned a damages claim solely for purposes of litigation and who is a mere collection agent with no stake in the outcome of the case. Resp. Br. 19. Respondents' argument is that these principles are inapplicable here because of the sheerest of formalisms – the claim that their obligation to the PSPs was defined in two separate contracts. They further contend that use of such formalisms to confer standing was endorsed by *Vermont Agency*, was accepted at the time of the framing of the Constitution, was assumed by this Court and lower courts thereafter, is required by Federal Rule of Civil Procedure 17, and is essential to other commercial arrangements. Each of these claims is baseless.

---

[3] Respondents do argue that "[t]he nine years respondents have now litigated against AT&T" "bespeak concrete adverseness in full measure." Resp. Br. 43. However, this reflects no more than respondents' *contractual* commitment to pursue the PSPs' claims "on [their] behalf." Pet. App. 115. Beyond that, they do not explain why nine years is any more indicative of standing than the five years that the Eastern Kentucky Welfare Rights Organization spent litigating the rights of indigents to health care in *Simon*, *see* 426 U.S. at 32, or the fact that any lawyer or other agent is motivated vigorously to pursue claims on behalf of their principals. "[M]otivation" simply "is not a substitute" for satisfying the requirements of standing that "focus litigation efforts and judicial decision making." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226 (1974).

A. Respondents' Two-Contract Theory Is Factually And Legally Erroneous And Irrelevant To Article III.

Although respondents admit that they brought this case on behalf of 1400 PSPs and are contractually required to remit all proceeds of the litigation to the PSPs, they contend that courts are required to treat them not as collection agents, but rather as the "own[ers]" both of the PSPs' claims and of any recoveries in this action. Resp. Br. 5-7, 17-24. They base these arguments on a formalistic "two contract" theory. They contend that they were assigned unencumbered legal title to the claims of the PSPs in one contract (the "APAO" or "Assignment Agreement") and that it is a purported "subsequent" and "entirely separate document" (the "Compensation Agreement Amendment") that requires the remission of all damages recovered in the litigation to the PSPs. *Id.* at 17. Because the Assignment Agreement purportedly made them owners of the claims, they argue that the "subsequent" Compensation Agreement Amendment is merely a "collateral" contract and is to be ignored in assessing their standing, just as the court would ignore a contract in which an injured party agreed to donate all proceeds of litigation to charity. *Id.* at 24.

These claims are baseless, root and branch. They rest on misrepresentations of the record, ignore basic contract law, and are refuted by the contrary findings of both lower courts. In all events, even if there were the two separate contracts that respondents allege, this Court has repeatedly held that the bedrock requirements of Article III cannot be evaded through such formalism.

First, respondents have misrepresented the two documents. The obligation to remit the proceeds of

the litigation is contained in the Assignment Agreement, *not* in the purportedly "subsequent" and "separate" Compensation Agreement Amendment. The Compensation Agreement Amendment says nothing about the treatment of any damages award, Pet. App. 116-21,[4] and respondents do not even purport to cite to a provision of this agreement that does so. Compare Resp. Br. 6-7. The court of appeals did not even address the Compensation Agreement Amendment.

Rather, it is the Assignment Agreement that requires that any and all damages be passed through to the PSPs. It provides that each PSP has assigned "title" to its claims solely "for purposes of collection," Pet. App. 114, and states that this assignment means that respondents will bring suit "on behalf of" the PSPs and seek to "collect[] DAC [dial-around compensation] *due the Company*" – *i.e.*, the PSP – and "owed to the Company." *Id.* at 114-15 (emphasis added). Indeed, respondents' accompanying cover letter explained that the provision "assign[ing]" the PSPs' claims "for purposes of collection" "will allow APCCS to prosecute the litigation *on your behalf*." *Id.* at 127 (emphasis added). The court of appeals thus found that this provision of the Assignment Agreement reflects "the aggregator's promise to pass back to the PSP whatever it is able to collect," *id.* at 12, and concluded that the Assignment Agreement contains "the aggregators' promise to hand over any

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[4] Rather, the Compensation Agreement Amendment established a mechanism for the funding of the litigation by PSPs, and, in this connection, it provided only that, if the aggregator "recovers *attorneys fees and/or costs* in connection with any lawsuit APCCS may bring to collect PSP's [dial-around compensation] Claims, it will remit *such* recoveries." Pet. App. 120 (emphasis added).

recovery." *Id.* at 14. The district court had also so found. *Id.* at 86 ("The assignments do not give plaintiffs the right to retain or share in any proceeds of the litigation.").

Second, even if the Compensation Agreement Amendment had addressed the treatment of any damages recovery, it is not a "subsequent" and "separate" agreement. As respondents admit, the two documents were presented to the PSPs as an integrated package that, when signed together, would entitle respondents to enforce a PSP's claim. "The APOA and Compensation Agreement were sent to PSPs with a cover letter from an official of APCC Services." Resp. Br. 7. That cover letter stated that "[a]ttached are the documents that you ***must execute and return*** if you wish to be a part of APCC Services' (APCC) litigation efforts" and told the PSP that it must sign both "**immediately to assure inclusion in the suits to collect unpaid dial around compensation.**" Pet. App. 122 (emphases in original).

Under black letter contract law, the Assignment Agreement and the Compensation Agreement Amendment comprised a single, unitary contract. Even in the absence of an express statement of incorporation, "instruments executed at the same time, by the same contracting parties, for the same purposes, and in the course of the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument." *Crowe* v. *Bolduc*, 334 F.3d 124, 137 (1st Cir. 2003); *accord W. United Assurance Co.* v. *Hayden*, 64 F.3d 833, 842 (3d Cir. 1995); 11 *Williston on Contracts* §§ 30:25-30:26 (4th ed. 1990 & Supp. 2007).

Third, respondents' arguments would be spurious even if their two-contract theory were not unsustainable both factually and legally. Because Article III standing enforces fundamental constitutional limitations on the judicial power, standing turns on the actual substance of a plaintiff's interest, not the form of the paperwork on which the plaintiff sues. This Court has repeatedly confronted the question whether assignments or similar "for collection only" transfers of interest give rise to original federal court jurisdiction. In each case, it has looked beyond the formalities, examined the substance of the legal relationship, and held that federal jurisdiction cannot be invoked by a plaintiff when, as here, it never was entitled to receive any of the relief awarded in the case.[5]

Respondents' only answer to that wall of authority is to contend that, while the Court scrutinizes the substance of a plaintiff's interest in a case for purposes of diversity or original jurisdiction, the Constitution should blindly yield to formalism when Article III's case-or-controversy requirement is at stake. Resp. Br. 41-42. That cannot be right. Article III injury must exist "in fact," see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), and so too must redressability. See *Steel Co.*, 523 U.S. at 106. Article III "is not a kind of gaming device." *ASARCO*

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[5] *See* Pet. Br. 28-31, 34 & n.4 (citing, *inter alia*, *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387 (1938); *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry.*, 220 U.S. 277 (1911); *Woodside* v. *Beckham*, 216 U.S. 117 (1910); *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U.S. 327 (1895); *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883)); *see also Navarro Sav. Ass'n* v. *Lee*, 446 U.S. 458, 465 (1980) (noting that diversity jurisdiction would be lacking over suit brought by plaintiffs "who act as mere conduits for a remedy flowing to others") (internal quotations omitted)

Inc. v. *Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion).

For each of these reasons, respondents' two-contract theory does not give them Article III standing. Respondents never have had independent legal control over any proceeds that might result from the claims they seek to enforce. From the moment the contracts were executed, all the money from any settlement or judgment was legally obligated to pass through respondents' hands and directly into the PSPs' pockets. See Resp. Br. 14 (noting that the PSPs could enforce their claim to the proceeds in a breach of contract action). There is no merit to respondents' assertion that the putative division of their arrangement between two separately stapled documents gave them some fleeting "legal authority to dispose of those proceeds as they see fit." *Id.* at 21.

Respondents are also simply wrong in analogizing themselves to "an *original* owner of a claim" who agrees "to donate every penny she recovers in litigation" to a charity. *Id.* Such a party had a clear entitlement to the proceeds of the claims and the legal authority to re-direct the proceeds to a third party, and she entered into an independent agreement to pay over any judgment to a third party to satisfy some personal obligation or interest. Because her personal interests are redressed by a favorable judgment, she has standing. By contrast, respondents never have had any entitlement to the proceeds of this litigation, and a favorable judgment would redress no personal interests of theirs.[6]

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[6] Contrary to respondents' assertion, petitioners are not claiming that redressability and standing "depend on what the plaintiff plans to do with any recovery." Resp. Br. 40. Rather, petitioners claim only that Article III turns on whether the

B. *Vermont Agency* Does Not Support Article III Standing For Assignees-For-Collection-Only.

Contrary to respondents' argument, Resp. Br. 24-30, nothing in *Vermont Agency* supports the existence of Article III standing for assignees of claims for-purposes-of-collection-only. Petitioners have explained that such assignments cannot allow assignees to assert the injury in fact of the assignor. Pet. Br. 32-37. But, even if they did, *Vermont Agency* made it explicit that an assignee cannot have Article III standing unless it also has a concrete personal stake in the outcome of the case – that is, an interest that would be redressed by a favorable judgment. In particular, this Court reiterated that redressability is one of the three invariable requirements of constitutional standing. 529 U.S. at 771. The Court then specifically discussed the bounty that the relator would receive, explaining that, because of "the bounty he will receive if the suit is successful," "a *qui tam* relator has a 'concrete private interest in the outcome of [the] suit.'" *Id.* at 772 (alteration in original) (quoting *Lujan*, 504 U.S. at 573).

Respondents counter with a strained reading of *Vermont Agency* that rests on extrapolations from the parties' briefs in that case and not on this Court's opinion. Resp. Br. 25-30. The thrust of respondents' argument is that *Vermont Agency* categorically

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plaintiff has an objectively cognizable legal interest in the outcome of the litigation because it has or had an independent legal right to the remedy – that is, the legal authority to receive and determine the disposition of any legal relief awarded. Because respondents never had that right, they do not have a personal stake in the litigation that a court can redress, regardless of how they subjectively intend to dispose of the proceeds.

approved "assignee standing" based solely on the assigned injury, and that the Court's discussion of the relator's bounty and redressability was mere dicta directed at an unrelated argument of the petitioner in that case. Thus, on respondents' view, *Vermont Agency* actually holds that a *qui tam* relator would have Article III standing even if Congress provided no bounty whatsoever. *Id.* at 29.

That assertion lacks merit. The Court held that a bounty *alone* could not confer standing because Article III also requires an injury traceable to the defendant's conduct. *Vermont Agency*, 529 U.S. at 772-73. But the Court treated the *qui tam* statute as effecting a partial assignment of the injuries as well as the rights of recovery of the United States, and it held that the assignment of the United States' injury satisfied injury in fact and thus provided an "adequate basis for the relator's suit *for his bounty*." *Id.* at 773 (emphasis added). Nothing in the opinion suggested that the assignment of the United States' injury could establish Article III standing if there were no bounty and if the *qui tam* relator had no personal stake in the outcome of the case that would be redressed by a favorable judgment.

Contrary to respondents' assertion, *Vermont Agency* thus establishes only that an assignee has Article III standing when there has been a complete or partial assignment of the entire right, title, and interest of the assignor, including critically the right to the proceeds of the claim. Those were the facts in each of the assignment cases discussed by the Court in *Vermont Agency*; indeed, each case appears to have involved complete conveyances of the entire claim

(the chose in action). *Id.* at 774.[7] Not one of those assignments was for-collection-only. But respondents have legal "title" to the "claim" of the assignor PSPs for-purposes-of-collection-only, and respondents never had an independent legal right to the proceeds of that claim.

C. Suits By Assignees-For-Collection-Only Were Not Recognized At The Time Of The Constitution's Ratification.

In *Vermont Agency*, the Court also relied on the fact that there had been "a long tradition" of "*qui tam* actions in England and the American Colonies" at the time of the Constitution's framing, holding that Article III is "properly understood" to confer standing to bring cases "of the sort" that were then "amenable to, and resolved by, the judicial process." *Id.* at 774-77. But, contrary to respondents' claims, there is no such history of suits by assignees-for-collection-only.

Respondents state that the right of certain "assignees to sue was well established when the Constitution was ratified." Resp. Br. 31. That is true, but those assignees had been transferred the entire *chose in action* – *i.e.*, not merely the claim, but also the right to the proceeds. In this regard, respondents cite (at 31-32) a line of this Court's decisions from *Turner* v. *Bank of North America*, 4 U.S. (4 Dall.) 8 (1799), through *Ambler* v. *Eppinger*, 137 U.S. 480 (1890), but ignore that each involved an

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[7] *Poller* v. *Columbia Broad. Sys., Inc.*, 368 U.S. 464, 465 (1962), *rev'g* 174 F. Supp. 802 (D.D.C. 1959); *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 829 (1950), *aff'g* 77 F. Supp. 493 (D. Mass. 1948); *Hubbard* v. *Tod*, 171 U.S. 474, 495, 498, 500 (1898); *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 531 (1995); *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 288 (1993).

assignment of the entire chose in action – both the claim and the proceeds. By contrast, respondents offer no evidence that courts at the time of the framing had *ever* entertained claims that had been assigned for-collection-only, much less that they had done so routinely or even occasionally.

D. Decisions Over The Last Century Do Not Establish That Assignees-For-Collection-Only Have Article III Standing.

Respondents ultimately acknowledge that suits by assignees-for-collection-only were not even brought until the end of the 19th Century. Resp. Br. 38. But they contend that courts have tacitly recognized standing in such suits on a "massive scale" ever since. *Id.* This, too, is both wrong and irrelevant.

Respondents state that "this Court's first encounter with an assignee-for-collection" case was *Williams* v. *Nottawa*, 104 U.S. 209 (1881), where the Court held that the assignment was an illicit attempt to manufacture diversity jurisdiction and ordered dismissal of the federal court action. See Resp. Br. 33 n.5. The Court later encountered suits in which assignments-for-collection-only were relied upon to establish controversies between states that are within this Court's original jurisdiction as well as controversies between citizens of different states, but (after examining the substance of the assignments) the Court held that these assignments created no such controversies. See *supra* p. 9 & n.5.

Respondents argue that these decisions implicitly support their claim of standing because the actions were dismissed on the ground that the assignments were insufficient to establish diversity or original Supreme Court jurisdiction and purportedly did not contain "even a hint" that a suit by an assignee-for-

collection-only might not be a case or controversy if it were brought in federal district court under federal question jurisdiction. Resp. Br. 41-42 (emphasis omitted); see *id.* at 33 n.5. That is simply wrong. While the Court required dismissal of these claims on the ground that the assignments evaded other jurisdictional limitations, it also stated that an assignee-for-collection-only has no interest in the litigation and that the assignor is the "real party in interest." See, *e.g.*, *New Hampshire* v. *Louisiana*, 108 U.S. 76, 88-91 (1883); *Kansas* v. *United States*, 204 U.S. 331, 340-41 (1907). These statements were made long before there was a Federal Rule of Civil Procedure 17 and long before the development of the modern law of standing. But the statements represented this Court's recognition that assignees-for-collection-only have no personal stake in the outcome of the case. The Court then had no reason to address standing because there were other, narrower grounds for dismissing these suits.[8]

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[8] Respondents also assert that these decisions implicitly establish that assignees-for-collection-only can bring an action in federal district court when, as here, the assignor of the claim could do so. Resp. Br. 41-42. Respondents are confused. In many of these cases, the Court was applying the (since-repealed) section of the Judiciary Act of 1789 that prohibited any assignee of a claim from bringing a suit in federal district court unless the court would have had jurisdiction over the case if no assignment had been made. *See Williams*, 104 U.S. at 210. Where the latter condition did not exist, this statute barred an action by *any* assignee, including assignees of the entire chose in action. Conversely, this statute could not and did not grant federal courts jurisdiction over claims by assignees whenever the assignors could maintain them. Plainly, Article III prohibits any assignee from bringing an action unless it independently demonstrates its standing.

Respondents next rely on *Spiller* v. *Atchison, Topeka & Santa Fe Railway*, 253 U.S. 117 (1920), and *Titus* v. *Wallick*, 306 U.S. 282 (1939). They concede that the Court did not address the federal claimants' standing in either case, but they argue that standing could not have existed in either case "under petitioners' own theory." Resp. Br. 35 (emphasis omitted). That is wrong. As petitioners have demonstrated, in both these cases, the assignee-for-collection-only had already fully litigated the claims and obtained a favorable judgment in forums (a state court and an administrative agency) that are not subject to Article III's case or controversy requirement but that had provided fair procedures. Pet. Br. 38-42. The federal court action was brought on the prior judgment, not on the assignment, and the defendants' failure to adhere to the judgment had caused injuries to the claimant that a favorable federal court ruling could redress. Thus, any "drive-by jurisdictional" ruling in these cases was in no way inconsistent with petitioners' position on Article III standing here.

Respondents' remaining historical arguments have even less substance. They claim that the ability of assignees-for-collection-only to bring suits was well established in other courts "[b]y the early 20th century." Resp. Br. 32. But, to support this assertion, they cite only secondary sources that discuss the practice in state courts where Article III has no application. Charles E. Clark & Robert M. Hutchins, *The Real Party in Interest*, 34 Yale L.J. 259, 264 (1925) (focusing on state court decisions and never discussing Article III jurisdiction); John Norton Pomeroy, *Code Remedies* § 70, at 96-99 (4th ed. 1904) (addressing only whether, under state law, such assignees were the real party in interest).

Respondents also contend that lower federal courts have "frequently entertained suits by assignees-for-collection." Resp. Br. 34. But here they cite exclusively antitrust cases brought by associations. *Id.* Standing was not addressed in any of these cases, and appears to have rested on principles of associational standing that respondents do not even pretend they can meet.

In short, there is no substance to respondents' claim that petitioners' argument "assumes blindness to supposed jurisdictional defects on a massive scale." *Id.* at 38. There is no great body of decisions that even arguably assumes that assignments-for-collection confer standing to bring suit in federal court. The scattered rulings on which they rely are either supportive of petitioners, applications of associational standing principles, or, at most, "drive-by" jurisdictional rulings of lower courts that have no precedential value. Compare *Steel Co.*, 523 U.S. at 91 (even such rulings by Supreme Court lack precedential value).

E. Decisions Under Federal Rule of Civil Procedure 17(a) Are Irrelevant.

Respondents also rely on lower court decisions holding that assignees-for-collection-only are the "real party in interest" for purposes of Federal Rule of Civil Procedure 17 and claim that these decisions provide "support for the proposition that suits by such assignees are cases and controversies." Resp. Br. 38. But, as explained in petitioners' opening brief (at 42-43), the "real party in interest" inquiry "address[es] party joinder, not federal-court subject-matter jurisdiction." *Lincoln Prop. Co.* v. *Roche*, 546 U.S. 81, 90 (2005). Indeed, "elements of the standing doctrine are clearly unrelated to the rather simple proposition set out in Rule 17(a), and plaintiff must

both be the real party in interest and have standing." 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1542, at 330 (2d ed. 1990) (emphasis added). Here, as noted above, this Court recognized that assignees-for-collection-only have no personal stake in the outcome of a case long before there was a Rule 17(a), and it is the absence of this interest that bars standing by such mere collection agents.

Petitioners have never disputed that there may be some overlap between the legal interests that give rise to real-party-in-interest status and standing. Certainly, a plaintiff that has standing will very often also be the real party in interest. But the problem for respondents is that the comparison does not work as well in the other direction. Not uncommonly, the interest that makes a plaintiff a real party in interest – whether through statutory authorization or contractual arrangements like those in *New Hampshire*, *Woodside*, *Lehigh*, and here – will fall short of the Article III mark. See Pet. Br. 43. Thus, the court of appeals was simply wrong in concluding that Rule 17 status somehow fills in the redressability gap in respondents' claim to Article III standing. See Pet. App. 14-16.

F. Petitioners' Proposed Ruling Would Have No Effect On The Rights Of Trustees.

Finally, respondents assert that a parade of asserted horrors will ensue if they are denied Article III standing. According to respondents, such a ruling would deny standing to trustees and have broad ramifications for the law of trusts and estates, bankruptcy, and ERISA. Resp. Br. 40-41. These contentions are makeweights.

Trusts, like corporations, are legal persons. Trusts can act only through trustees who hold title to the trust assets for all purposes (subject to fiduciary duties to the trust's beneficiaries). "In most cases, a trustee has exclusive authority to sue third parties who injure the beneficiaries' interest in the trust, including any legal claim the trustee holds in trust for the beneficiaries." *Chauffeurs Local No. 391* v. *Terry*, 494 U.S. 558, 567 (1990) (plurality opinion) (citing Restatement (Second) of Trusts (1959); 4 W. Fratcher, *Scott on Trusts* (4th ed. 1987)). A trustee is not assigned claims for purposes of collection, and a ruling in petitioners' favor under Article III could not call into question the settled rule that a "trustee can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust." Restatement (Second) of Trusts § 280 (1959). Beyond that, suits by trustees are "of the sort traditionally amenable to, and resolved by, the judicial process," *Vermont Agency*, 529 U.S. at 774, while suits by assignees-for-collection-only are not.

II. IN ALL EVENTS, PRINCIPLES OF PRUDENTIAL STANDING COMPEL DISMISSAL OF RESPONDENTS' SUIT.

Alternatively, whether or not there is Article III standing, well-settled principles of prudential standing bar respondents from prosecuting this federal court damages action on behalf of 1400 absent PSPs. Petitioners devoted nearly 15 pages of their opening brief to a detailed showing that principles of prudential standing foreclose respondents' suit. Pet. Br. 43-57. Respondents have literally made no attempt to respond. Rather, they have randomly responded to only a handful of subsidiary points

embodied in petitioners' argument, but, even as to these points, respondents are not persuasive.

The doctrine of prudential standing is a set of "judicially self-imposed limits on the exercise of federal jurisdiction," *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004), that have been developed to protect the institutional interests of the federal courts, *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 231 (1990) (plurality opinion), and to maximize "convenience and efficiency" in litigation, *United Food & Commercial Workers Union* v. *Brown Group*, 517 U.S. 544, 557 (1996). Because these rules are not required by Article III, the doctrine does not apply where Congress has authorized suits by particular parties on behalf of third parties. *Id.*

But the doctrine unquestionably applies in this case. Respondents are aggregators, and, as petitioners demonstrated in their opening brief (at 51-52), aggregators do not fall within the "zone of interests" protected by the relevant provisions of the Communications Act or of the implementing regulations that the Federal Communications Commission has adopted. Respondents do not argue otherwise. To the contrary, they correctly state that "the FCC developed a compensation plan to ensure *that PSPs* are compensated for dial around calls[, and that t]he plan required IXCs such as AT&T to compensate *PSPs* for calls that the IXC 'completes.'" Resp. Br. 2 (emphasis added); see also Pet. Br. 51-52.

Where, as here, the doctrine of prudential standing applies, it is well settled that a plaintiff ordinarily "cannot rest his claim to relief on the legal rights or interests of third parties." *Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955-56 (1984); see Pet. Br. 45 (collecting cases). A court can exercise jurisdiction over suits that are brought to vindicate the rights of

third parties only where the third parties are "unable" to do so, *Diamond* v. *Charles*, 476 U.S. 54, 65-66 (1986), or there is at least some "genuine obstacle" to their doing so, *Singleton* v. *Wulff*, 428 U.S. 106, 116 (1976). See Pet. Br. 49. Here, respondents' brief has confirmed that the PSPs were fully capable of bringing this lawsuit in their own names, that allowing respondents to sue for the PSPs creates all the evils that the Court's general rule discourages, and that there are additional compelling reasons to prevent such abuses of the federal court system and of the defendants to this action.

A. The 1400 PSPs Were Fully Able To Bring This Action In Their Own Names.

Under the principles of prudential standing, suits brought on behalf of third parties are impermissible when the third parties are fully capable of bringing suit themselves. Here, there is no question that the instant action could have been brought by the PSPs, with the respondents serving as their attorneys or witnesses and not as putative plaintiffs. One of the plaintiffs to this case is a PSP, and there is no reason why the other 1400 PSPs could not have sued as plaintiffs as well.

Respondents' only answer to this indisputable fact is to erect strawmen. First, they argue that, because many PSPs are small businessmen who do not have large claims, many would not pursue their claims if each was required to hire counsel and to institute a separate action. Resp. Br. 50. Even if that were true (but see Qwest Br. 24 & n.17), it is irrelevant. Litigating 1400 separate lawsuits is patently not the only alternative to this lawsuit. Instead of obtaining assignments-for-collection-only from the 1400 PSPs, respondents could have obtained authorizations to file this lawsuit in the names of the 1400 PSPs. That

would have afforded the PSPs all the claimed efficiencies of a single action that would be prosecuted by a single set of lawyers and that would use the data that respondents have collected in their role of aggregators in calculating the amounts, if any, that IXCs owed to, or were owed by, each of the individual PSPs. But, as further explained below, such a suit would have avoided the discovery problems, impediments to counterclaims, issues of finality, and threat to the court that are inherent in a suit in which respondents are acting as assignees-for-collection of the damages claims of 1400 absent non-party PSPs. See also Qwest Br. 25 & n.19 (PSPs could have joined together in groups to file consolidated lawsuits that would be coordinated through multi-district litigation procedures).

Second, respondents argue that the instant lawsuit is a fairer and more efficient vehicle than would be a class action or a suit based on associational standing. Resp. Br. 44-48. But this is not a remotely relevant comparison, and respondents are intentionally missing the point. As petitioners have demonstrated, respondents patently could not have brought a claim for damages on behalf of 1400 individuals under associational standing principles. Pet. Br. 52-53. Similarly, it is petitioners' position that a class action would be impermissible under Federal Rule of Civil Procedure 23 even if the named plaintiff were a PSP because, among other things, the issues are individualized. *Id.* at 54-57; see Qwest Br. 18-19; *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 622 (1997). If respondents could recover individualized damages for 1400 PSPs as an assignee-for-collection-only, they would be evading two different sets of procedural rules – class action and associational standing – that *prohibit* such actions on behalf of

absent third parties in federal district courts. That fact vividly underscores that this action is barred by principles of prudential standing.

B. If This Action Is Not Dismissed, The Adverse Consequences That The Rules Of Prudential Standing Are Designed To Prevent Will Occur On A Massive And Unprecedented Scale.

As was explained in detail in petitioners' brief, the general rules that bar actions to enforce the rights of third parties foster interests of efficiency, convenience, finality, and fairness and protect other institutional interests of the federal courts – in myriad ways, large and small – that this Court has identified. Pet. Br. 45-49. While respondents ignore most of the adverse consequences that are inherent in departures from these rules, they try, at various points in their brief, to minimize some of the ill effects that will arise here if this case is not dismissed for lack of standing. But, rather than supporting respondents' position, their arguments merely underscore the inefficiencies, inconveniences, and threats to the integrity of the judiciary their lawsuit will engender, and all for no legitimate reason whatever.

For example, petitioners noted that, because respondents have not been assigned the PSPs' liabilities to petitioners, and because the PSPs are not parties, petitioners cannot assert counterclaims against the PSPs merely by listing the counterclaims in an answer to a complaint. Respondents seek to minimize this issue by suggesting that respondents should try to interplead the 1400 PSPs by locating, serving, and attempting to establish personal jurisdiction over each of them! Resp. Br. 55-56. Similarly, while respondents agree that the PSPs do

not have the obligations of a party to provide discovery, they rely on the fact that a magistrate has developed an alternative arrangement that permits discovery to be served on the PSPs through respondents. *Id.* at 48-51. But, as respondents do not dispute, the responses of the PSPs to the defendants' discovery have been nonexistent, woefully inadequate, or otherwise contemptuous, see Qwest Br. 12-13 – which could not happen if the PSPs were parties.[9] For each of these foregoing reasons, the non-party status of the PSPs has already imposed inefficiencies, substantial costs, and needless inconveniences on the defendants.

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[9] Respondents attempt to minimize the need for discovery from PSPs by purporting to refute Qwest's showing that there are at least four categories of information that PSPs know, that IXCs may not, and that is critical to litigation of dial-around compensation. Resp. Br. 51-54. But respondents offer no substantial response to Qwest's showing. First, it is irrelevant that the FCC regulations require PSPs to provide "lists" of their payphone lines and that LECs verify those lists. *Id.* at 52-53. As Qwest demonstrated, only the PSPs know what kind of phones are connected to these lines and whether devices have been attached that permit false and fraudulent claims for dial-around compensation. Qwest Br. 8 & n.9. Second, contrary to respondents' claim, an IXC cannot obtain "payphone coding digits" unless PSPs direct the LECs to provide this information. *Compare id., with* Resp. Br. 53. Third, while respondents admit that Qwest was in fact unaware that a large PSP had entered into a contract that precluded its substantial dial-around compensation claims, respondents make unsupported assertions that this situation was unique. *Compare* Resp. Br. 53-54, *with* Qwest Br. 9 & n.10. Fourth, while respondents are correct that IXCs would know if they had entered into contracts in which particular PSPs waived claims to dial-around compensation, they ignore that discovery from the PSPs still would be necessary to negate any defenses the PSPs might have under such contracts. Qwest Br. 9-10 & n.11.

In addition, while respondents now argue that the Assignment Agreement should be construed differently, Resp. Br. 20, it plainly provides that each PSP is bound only by a "final determination" of claims that are prosecuted by respondents in that PSP's "interests." This inherently creates the potential for a PSP to claim that it is not bound by a final judgment because respondents did not act in its interests. Pet. Br. 47-48. Similarly, because the PSPs are not parties, respondents can respond to a failure of the PSPs to provide necessary information by revoking the assignments before any determination is made of the PSPs' rights or liabilities. Compare *Brown*, 517 U.S. at 556 (when damages action is brought on behalf of absent third parties, there is a risk that the court and parties will invest resources in litigating the case "only to find the plaintiff lacking [necessary] detailed ... evidence"). Because there would be no "final determination" of the PSPs' claims, those PSPs would then be free to pursue their claims in another forum.

Because this case involves claims brought on behalf of 1400 individual PSPs, the adverse consequences that the rules of prudential standing are intended to avoid would arise on a massive and unprecedented scale if this action were allowed to proceed. And there is simply no reason for the Court to accept any of these risks here. As explained above, these 1400 PSPs can be, and should be, the named plaintiffs. And, if they were, there would be no impediments to discovery, no impediments to asserting and litigating counterclaims, no risk that a PSP could later claim not to be bound by an adverse judgment, and no possibility that the lawsuit could be abandoned because factual information was not produced and a second lawsuit later instituted on the same claim.

These are among the reasons for the rule that, unless Congress so authorizes, the doctrine of prudential standing categorically bars damages actions on behalf of absent third parties where, as here, the absent third parties are fully capable of bringing suit in their own names.

Finally, this is also a singularly inappropriate case for creating an exception to the settled principles of prudential standing that ensure the integrity of federal courts. Even if there were legitimate reasons for allowing suits to be brought by an assignee-for-collection-only on behalf of the 1400 PSPs, there are other forums in which such actions can be brought. As respondents state, "aggregators have brought myriad cases before the FCC" to recover dial-around compensation on behalf of PSPs. Resp. Br. 4. The FCC is not subject to case or controversy requirements and has developed nonjudicial procedures for adducing the relevant facts, and assignees-for-collection can enforce the FCC's orders in federal court proceedings. See *supra* pp. 16, 20.

In this regard, the FCC has never stated that aggregators play "an indispensable role" in collecting compensation for dial-around calls in any forum, compare Resp. Br. 4, and the only circumstance in which aggregators have played any role at all is in FCC complaint proceedings where rules of Article III and prudential standing do not apply. The fact that aggregators have this alternative remedy underscores the impropriety of here creating an exception to principles of prudential standing that would allow these third-party claims to be brought in federal district court.

In short, respondents' effort to litigate as mere assignees-for-collection-only does not satisfy Article III. But, even if it did, principles of prudential

standing require dismissal of respondents' federal court damages action.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' opening brief, the judgment should be reversed.

Respectfully submitted,

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Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P.
AND AT&T CORP.,
Petitioners,

v.

APCC SERVICES, INC. *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NETWORK IP, LLC AND NETWORK ENHANCED TELECOM, LLP IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

NetworkIP, LLC and Network Enhanced Telecom, LLP.,[1] (collectively, "NET"), have a direct interest in the outcome of this matter as they are currently defendants in an action brought by the Respondents APCC Services, Inc. *et al.* (collectively, "Aggregators") before the Federal Communications Commission ("FCC") claiming millions of dollars in dial-around compensation. *See, e.g., In the Matter of APCC Services, Inc. et al. v. Network IP, LLC and Network Enhanced Telecom, LLP*, 20 FCC Rcd 2073 (2005) (determining liability for payphone dial around compensation); 22 FCC Rcd 4286 (2007) (awarding damages to Aggregators). Aggregators have also filed a related suit in the United States District Court for the Eastern District of Virginia to collect the damages awarded by the FCC. *APCC Services, Inc. et al. v. Network IP, LLC and Network Enhanced Telecom, LLP*, No. 07-549 (Complaint filed June 5, 2007) (stayed pending review by the D.C. Circuit). The FCC's finding of liability and damages award are currently under review by the United States Court of Appeals for the District of Columbia Circuit. *Network IP, LLC and Network Enhanced Telecom, LLP v. Federal Communications Commission and United States of America*, No. 06-1364, consolidated with 07-1092 (D.C. Cir., filed April 12, 2007).

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[1] Pursuant to Sup. Ct. R. 37, all parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court. No party or counsel for any party authored this brief in whole or in part and no person or entity, other than the *Amicus Curiae*, made a monetary contribution to the preparation of this brief.

Unlike the Petitioners and the other *Amicus Curiae* in this case, NET is a small business of approximately 100 employees headquartered in Longview, Texas. NET pioneered an innovative new business model based on advances in telecommunications switching technology. Through this technology, NET provides telecommunications carriers who sell prepaid calling cards to the public a virtual switching platform that enables them to control their calling card products as if they had purchased their own switch—but more efficiently and more cost effectively. NET represents the fulfillment of one of the fundamental goals of the Telecommunications Act of 1996, which was to increase opportunities for entrepreneurs and small businesses in the telecommunications industry and encourage technological innovation. H.R. Rep. No. 104-458, at 136 (1996).

NET, a small company with limited resources, has been forced to wage a nearly decade-long war of attrition with Aggregators. NET has waged this battle because it believes that it fully complied with the payphone compensation rules. The practical consequences discussed below of granting Aggregators standing to pursue claims under §§ 206 and 207 of the Communications Act, 47 U.S.C. §§ 206 and 207, which establish jurisdiction for damages claims for unpaid dial-around compensation, have been disastrous for NET.

SUMMARY OF ARGUMENT

NET hopes that its brief will serve the Court by offering a practical perspective on why Aggregators are precisely that sort of plaintiff that the standing doctrine is intended to block at the courthouse door.

NET is a small business that has had to spend millions of dollars in attorney fees and divert thousands of hours of its management team's time and attention to defending against Aggregators' claims, resulting in immeasurable lost business opportunities, all because of Aggregators' litigation tactics, which effectively use their lack of identity with the payphone owners whose alleged damages they seek to collect as a sword in litigation.

Aggregators have established a practice of filing nearly identical actions for unpaid dial-around compensation against numerous carriers and then claiming ignorance of whether or not the underlying payphone owner has already been made whole for any particular call for which Aggregators claim to seek dial-around compensation. The result is that Aggregators shift their burden of proof to defendants in such actions, thereby presenting defendants with the overwhelming task of figuring out which of the millions of payphone calls that have passed through their switches—in many cases, months or years prior to the date of Aggregators' complaint—are entitled to dial-around compensation, and whether or not the person who owns the payphone from which that call originated has already been paid for a particular call. The Aggregators make this task virtually impossible because they represent more than a thousand individual payphone owners that collectively own hundreds of thousands of individual

payphones. The owners themselves never appear in the case and provide no information that could help identify specific calls or determine whether payments for those calls have already been received.

While Aggregators' complaint against NET was brought before the FCC rather than before a court, as is a plaintiff's option under §§ 206 and 207 of the Communications Act, the difficulties that NET has experienced in attempting to defend against Aggregators' claims are of the same type as those faced by carriers sued by Aggregators in the courts. NET therefore believes that its experience may provide the Court with a clearer view of the practical implications for defendants—and small business defendants such as NET in particular—of the holding that Aggregators have standing to pursue damages claims on behalf of more than a thousand individual payphone service providers.

ARGUMENT

1. NET Is A Very Small Link In The Call Chain.

Based on innovations in switching technology, NET pioneered a business model allowing its telecommunications carrier customers to maintain control over switching capabilities without buying and deploying their own switches. NET's innovative business model gives its customers the ability to maintain and control all of the central economic attributes of their prepaid business through real time access, over the Internet, to the servers that house the requisite switching capability. The capabilities in these switches allow carriers to activate cards, generate PINs, rate calls, keep track

of how much time is left on cards, identify and track calls, capture call-related information, and set prices, including payphone compensation surcharges. NET's virtual switching platform allows its customers to control those switching capabilities just as if they had purchased the switching equipment themselves.

When calling from a payphone, a prepaid calling card user dials the 1-800 number printed on the card. The call is transmitted over a local telephone line to the local telephone company, such as Verizon, that serves the payphone. The local telephone company then hands the call to a long distance carrier, such as Sprint, that delivers the call to NET. NET has contracted with a number of long distance companies, such as Sprint and Global Crossing, to deliver these calls to NET over their long distance networks. In the context of payphone compensation regulation, these long distance companies are known interchangeably as the first facilities-based or underlying interexchange carrier or IXC. Once the call reaches NET, the caller is prompted to enter a PIN number and dial the number of the called party. NET then physically routes the call to another IXC that picks up the call from NET's switch and delivers the call, over its network, to the local telephone company serving the called party. NET thus sits in the middle of the call chain. It does not own any transmission facilities; it owns only switches and servers. It has no contractual relationship with any payphone owners, let alone their putative Aggregator surrogates.

2. Aggregators Use Their Lack Of Identity With The Payphone Owners As A Sword In Litigation.

Aggregators have developed a cottage industry of suing more or less all telecommunications carriers participating in the United States economy for dial-around compensation and then arguing that they cannot reasonably know whether one or more carriers have already paid for the payphone calls for which they claim damages for lack of payment. That is precisely the strategy that Aggregators have used to pursue NET for damages.

Despite the fact that, during the period at issue in this case, Aggregators represented owners of less than a third of the payphones in the United States, they have nonetheless filed the vast majority of payphone compensation cases, filing 129 complaints at the FCC alone in the past six years. *See* Response of Kevin J. Martin, Chairman, to Questions For the Record from the December 5, 2007 Hearing of the House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet ("Martin Response to Questions"), at Attachments A and B (relevant portions included herewith at Appendix pp. 8a-13a).

During the time at issue in NET's case and in the case at bar, Payphone Service Providers ("PSPs") were entitled to no more than a single payment of $0.24 per call regardless of how many carriers were involved in the call chain and may have undertaken the payment obligation. It is therefore an essential element of a claim for damages based on unpaid dial-around compensation that the compensation is, in fact, unpaid by any carrier.

The FCC's rules concerning which party in the call stream is liable to PSPs for dial-around compensation have changed multiple times over the years, thereby creating uncertainty as to whom the proper payor should be, *see, e.g.,* Martin Response to Questions 2 a, b, and c (summarizing the tortured history of dial-around compensation liability) (App. pp. 2a-7a); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, ¶ 8 (2003) (acknowledging payphone rules had caused confusion in the marketplace concerning which carrier is responsible for payment). Capitalizing on this confusion, Aggregators have sued multiple carriers for the same calls. It is therefore likely that the individual payphone owners that Aggregators claim to represent are being paid multiple times for the same calls. NET is certainly not aware of how the Aggregators who, in addition to filing hundreds of complaints and settling scores more, have allocated or plan to allocate the damage awards and settlements that they receive to specific payphone calls made from their customers' payphones that they allege were never compensated.

Allowing Aggregators to sue for dial-around compensation in this manner hampers the already difficult process of assessing damages in these types of cases. Aggregators have little information about their payphone customers regarding the damages that Aggregators claim to be pursuing on their behalf. Indeed, Aggregators argued in their case against NET that the very identity of their PSP customers and how much each claims as damages is irrelevant. This is an astounding claim from an entity that claims to be suing solely on behalf of its

individual PSP customers, to whom Aggregators would distribute any damages that they collect for allegedly uncompensated calls.

According to Aggregators, all the information that NET needed to know was the telephone numbers associated with the payphones owned by its PSP customers and when those payphones were in operation. NET was then saddled with the burden of figuring out whether or not it had participated in any completed, uncompensated calls from those numbers and, if so, how many. NET could, with great difficulty, ascertain whether it received a call from a payphone owned by one of Aggregators' clients, and whether that call was "completed" and thus theoretically compensable. But neither NET nor any other defendant targeted by Aggregators have any way of determining whether any individual payphone owner has in fact already been compensated for any particular call, or whether the individual payphone owner may have had arrangements with other carriers involved in the call chain to exclude those calls from the compensation regime—a common practice.

Aggregators claim to have no way of knowing any of this since they do not share a unity of identity with their PSP clients, and have argued that the burden should be on defendants such as NET to somehow disprove that dial-around compensation is *both* owed *and* unpaid. This is not an academic problem, as NET's carrier customers had contractually agreed to be responsible for paying dial-around compensation to the PSPs, and some of those customers had in fact made payments to Aggregators for calls that passed through NET's switches. It is therefore highly likely that

Aggregators are in fact collecting damages for the same calls from multiple carriers.

With this tactic, Aggregators have managed to shift the burden to defendants, such as NET, Qwest, AT&T, and Sprint, to disprove an essential element of their claims—an element that Aggregators themselves argue is too burdensome to prove in the affirmative—that can only be disproven by evidence of the manner in which the PSPs have divided and allocated the sums obtained through litigation and confidential settlements with other carriers.

Aggregators also claim not to know the dates and times that the purportedly uncompensated calls were made, even though one would expect such basic information to be the starting point for a claim for damages as opposed to an afterthought. Aggregators claim only to know that calls were made from their clients' payphones, based on the telephone number assigned to those payphones, sometime during a particular quarter. NET has had no way to contact the individual PSPs to discover when the allegedly uncompensated calls were made from their payphones. Knowing the date and time of the calls at issue would have at least allowed NET to match up specific calls sent from one of Aggregators' PSP customers' payphones with those that reached NET's switch. Had NET been dealing directly with one or more of the actual payphone owners, these issues could have been readily addressed.

Because of Aggregators' ignorance of the particular facts surrounding their PSP clients' claims, NET had to dedicate enormous resources to going back and reviewing all of its call records for calls made four to six years prior to its litigation

with Aggregators. Because Aggregators were suing on behalf of more than a thousand PSPs that collectively had more than 650,000 individual payphones, the volume of material was overwhelming for a company the size of NET. All told, NET spent months reviewing nearly 15 million call records just to isolate calls sent from Aggregators' customers' payphones for the period between January through November, 2001. APCC, one of the Aggregators, alone submitted a file containing nearly 5 million entries, each entry consisting of a phone number for a payphone of one of its customers, with each number repeated for each quarter for which it was seeking compensation.

In order to avoid totally overwhelming NET's resources, NET agreed under pressure to utilize the results from this review as a proxy for the remaining time periods for which Aggregators sought damages. The end result, however, was completely divorced from any individual payphone owner's telephone or from any specific call for which compensation was allegedly due and owing. How Aggregators will actually distribute millions of dollars in damages to its individual PSP customers for specific calls remains a mystery.

3. These Practical Problems Demonstrate That Aggregators Are Not The Proper Parties To Seek Damages For These Claims.

The Communications Act confers standing upon only a narrow class of individuals to seek damages from common carriers that violate the Act, and basic principles of standing require that a plaintiff be in a position to fully present all facts necessary to litigate

its claim. Aggregators have suffered no direct injury, and use their very lack of direct access to all relevant facts as a sword in litigation. Aggregators therefore are not the proper parties to seek damages for the PSPs' claims.

Section 206 of the Communications Act, 47 U.S.C. § 206, establishes that a common carrier "shall be liable to the person or persons injured" by its violation of the Act. Section 207, 47 U.S.C. §207, then establishes that "[a]ny person claiming to be damaged" by such a common carrier may seek to collect damages from that carrier either in court or at the FCC. The plain language of both of these sections indicates that Congress intended to provide damages only to those directly injured by a common carrier. This Court noted in *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513, 1518 (2007), that both Congress and the FCC anticipated that the payphone compensation regime "would permit *a payphone operator*" to sue for unpaid dial-around compensation. (Emphasis added). Aggregators are mentioned nowhere in the Act.

The question of standing involves the nature and source of the claim asserted, including Congressional intent when statutory claims are at issue as they are here. A party such as Aggregators may therefore enjoy standing to pursue damages under the Communications Act only if the Act "can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The court has also stated this question as whether the plaintiff is arguably within the zone of interests to be protected by the

statute. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970).

Congress has chosen in other statutes to expand the class of persons enjoying standing to seek relief thereunder to the full limits allowable under Article III, for example granting the right to seek relief to "any party aggrieved" by a statute's violation. This Court has recognized that when Congress uses such expansive language, it does so with the intention of casting the standing net "beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Federal Election Commission v. Akins*, 524 U.S. 11, 19 (1998). Congress chose not to use such broad language in §§ 206 and 207 of the Communications Act, and therefore it is necessary to inquire upon whom it did intend to confer standing.

One of the purposes of requiring a personal stake in the outcome of litigation is to provide the best possible adversarial setting for the full litigation of a dispute, which includes ensuring an appropriate factual setting and the proper motivations of the parties. *See generally* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3531.7, at 512 (discussing the role of the "zone of interests" test for standing in assuring that the plaintiff can provide "a detailed fact setting that corresponds to the problems most likely to be encountered in the area of the dispute."); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (describing the role of standing as ensuring that a plaintiff possesses that "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends").

This role of the standing requirement—ensuring that a particular plaintiff is in the best position to present the facts necessary for a complete inquiry—is in part what distinguishes the standing inquiry from the more basic question of whether a private right of action exists for *anyone* under a statute or Constitutional provision. *See Davis*, 442 U.S. at 239 n.18 (distinguishing the issue of standing, which focuses on whether an individual is the proper plaintiff, from the question of whether a cause of action exists for relief of a particular type).

Both the Congressional requirement of direct injury found in sections 206 and 207 of the Communications Act and the more general standing requirement that a plaintiff be in a position to present all relevant facts converge in this case to deny Aggregators standing to sue on behalf of PSPs. While it may be more convenient for PSPs to rely upon Aggregators to litigate their claims for them, the PSPs' convenience does not outweigh the interests of the hundreds of defendants who have been forced to defend against Aggregators' claims without knowledge of whether the underlying PSPs have already been made whole for some or all of the damages alleged by Aggregators in any particular case.

CONCLUSION

The fact that Aggregators do not share a unity of identity with the payphone owners that they claim to represent should not provide them with a sword in litigation; rather, it should provide a basis to deny them standing to sue for dial-around compensation.

Respectfully submitted,

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APPENDIX

APPENDIX

U.S HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET

OVERSIGHT OF THE FEDERAL
COMMUNICATIONS COMMISSION:
MEDIA OWNERSHIP

QUESTIONS FOR THE RECORD FOR
FEDERAL COMMUNICATIONS COMMISSION
CHAIRMAN KEVIN J. MARTIN

DECEMBER 5, 2007

PLEASE RETURN TO THE SUBCOMMITTEE ON
TELECOMMUNICATIONS AND THE INTERNET
BY JANUARY 18, 2008

* * *

2. Chairman Martin, I understand that there have been thousands of payphone-related formal and informal complaints filed at the Commission since the payphone provisions of the Communications Act were added in 1996. If that is correct, it suggests there may be a need to reform the Federal Communications Commission's (FCC's) implementation of the payphone provisions to

ensure that the rules are fair to all entities involved in providing payphone service. So that the Committee can better understand the evolution of the current payphone compensation rules and the status of pending complaints, we would appreciate the following information:

a. By year of filing, please provide the number of informal and formal payphone compensation complaints, how many of these complaints remain pending, and how many have been resolved. With respect to resolved complaints, please also indicate by year how many have been granted, how many dismissed, how many settled, etc. For each year, please identify the top five complainants, the top five defendants, and the number of formal and informal complaints associated with each.

Answer:

The Commission recognizes the importance of payphones and we are committed to enforcing the payphone compensation rules. Please refer to Attachment A for the information you requested regarding formal payphone compensation complaints from 1996 through 2007. Please refer to Attachment B for the information you requested regarding informal payphone compensation complaints from 2000 through 2007. The Enforcement Bureau was created in the fall of 1999 and its databases do not track this type of informal complaint prior to 2000.

b. Please describe which entity or entities are responsible for compensating payphone providers for coinless calls under the Commission's current rules. When was the current rule adopted?

Answer:

On September 30, 2003, in the *Tollgate Order*, the Commission adopted the current payphone compensation rules to ensure that payphone service providers (PSPs) are fairly compensated for each and every completed, payphone-originated call, as required under section 276 of the Telecommunications Act of 1996. The *Tollgate Order* and its implementing rules became effective on July 1, 2004.

In the *Tollgate Order,* the Commission placed the obligation to compensate PSPs for coinless calls on the "Completing Carrier." In our rules, a "Completing Carrier" is defined as "a long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call or a local exchange carrier that completes a local, coinless access code or subscriber toll-free payphone call." This facilities-based long distance carrier is the switch-based reseller (SBR) or interexchange carrier that completes the call on a switch that it owns or leases.

In satisfying its liability obligation to a PSP, the completing carrier must establish its own call tracking system, have a third party attest that the system accurately tracks payphone calls to completion, and pay a PSP

directly based on the completing carrier's own call tracking data. Other facilities-based long distance carriers in the call path, if any, must provide reports to the PSPs of payphone-originated calls switched to another facilities-based carrier's platform.

c. Please explain what entity or entities were responsible for compensating payphone providers under the prior rules. Please describe each such rule and indicate when each prior rule was adopted.

Answer:

Since 1996, the Commission has issued a number of orders that have defined the relationship between PSPs and other carriers in the call path from the payphone to the called party for purposes of assuring that PSPs are adequately compensated for calls placed from payphones. In our prior orders, the Commission has identified three categories of such entities, depending on whether such entity completed the payphone originated call: (1) facilities-based long distance carriers (usually the IXCs); (2) switchless long distance resellers; and (3) switch-based resellers (SBRs).

IXCs Responsible. On September 20, 1996, in the *First Payphone Order*, the Commission adopted a "carrier-pays" system for per-call compensation, concluding that "the primary economic beneficiary of payphone calls should compensate the PSPs." The Commission concluded that the primary economic beneficiary was the IXC

and required "all IXCs that carry calls from payphones [. . .] to pay per-call compensation." The Commission recognized that switchless long distance resellers do not have the facilities to track calls. In the interests of lower costs and administrative efficiency, the Commission required facilities-based carriers to pay for calls received by their long distance reseller switchless customers and then, if they so chose, "to impose the payphone compensation amounts on these [reseller] customers."

SBR Responsible. On November 19, 1996, in the *Order on Reconsideration*, the Commission addressed the payphone compensation responsibilities for calls involving resellers that maintain their own switches. Recognizing that SBRs were the primary economic beneficiary of payphone calls and were capable of tracking calls, the Commission imposed on SBRs the responsibility to pay compensation to the PSPs.

First Facilities-Based IXC Responsible. On March 28, 2001, in response to a Petition for Clarification of the Rules, in the *Second Order on Reconsideration*, the Commission made the following findings. The Commission revised its rules to address the difficulty that PSPs face in obtaining compensation for coinless calls placed from payphones that involve an SBR in the call path. In the *Second Order on Reconsideration,* the Commission adopted rules re-

quiring the first facilities-based IXC to which a LEC routes a compensable coinless payphone call to: (1) compensate the PSP for completed calls at a mutually agreeable rate; (2) track or arrange for tracking of the call to determine whether it is completed and therefore compensable; and (3) provide to the PSP a statement of the number of coinless calls it receives from each of that PSP's payphones. The Commission required each reseller or debit card customer whose number is dialed on a coinless basis to reimburse the first facilities-based carrier (1) for the amount paid by that carrier to the PSP and (2) for that carrier's cost of tracking the call and providing such information to the PSP. The Commission also encouraged PSPs and SBRs to enter into private contractual arrangements with each other for direct payment of compensation to PSPs.

In January 2003, on a petition for review, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated and remanded the *Second Order on Reconsideration* on the grounds that parties were not afforded proper notice and opportunity for comment. The D.C. Circuit vacated the Commission's order, but stayed its mandate and its vacatur of the *Second Order on Reconsideration* through September 30, 2003. As a result, the rules promulgated in the *Second Order on Reconsideration* remained in effect through September 30, 2003.

Completing Carrier Responsible. On September 30, 2003, the Commission adopted the current payphone compensation rules in the *Tollgate Order,* which placed payphone compensation liability on the Completing Carrier. Instead of assigning liability to the *first* facilities-based IXC, who had no relationship to the customer, the Commission imposed liability on the "primary economic beneficiary" of the payphone-originated call, *i.e.,* the facilities-based carrier that sold the dial-around service to end-user customers and that can recover payphone compensation from its customers.

Until the new *Tollgate Order* rules could become legally effective, the Commission adopted, for a limited period, the rules originally adopted in the *Second Order on Reconsideration* until the current payphone rules became effective on July 1, 2004.

ATTACHMENT A

Formal Payphone Compensation Complaints							
Year	**Total Filed**	**Still Pending**	**Granted**	**Denied**	**Settled and Dismissed**	**Top 5 Complainants (number of complaints)**	**Top 5 Defendants (number of complaints)**
1996	0	0	-	-	-	-	-
1997	1	0	-	-	1	International (1)	Sprint (1)
1998	10	0	9	-	1	Pacific Bell (7) Ameritech (2) US West (1)	Frontier (8) MCI (2)
1999	2	0	-	-	2	US West (1) Ameritech (1)	Frontier (2)
2000						US West (1) Ameritech (1)	Oncor Communications (1) One Call Communications (1)
2001	0	0	-	-	-	-	-
2002	8	0	2	3	3	APCC (8)	Advanced Business Tel. (1) Bee Line Long Distance (1) Gadjraj & Sons Import and Export (1) Orion Telecommunications (1) Tekbilt World Communications (1) TS Interactive, Inc. (1) United Tech Systems (1) Vertex Group (1)
2003	3	0	1	-	2	APCC (2) Qwest (1)	Cable & Wireless (1) NetworkIP (1) ATX Communications (1)
2004	0	0	-	-	-	-	-

Formal Payphone Compensation Complaints							
Year	**Total Filed**	**Still Pending**	**Granted**	**Denied**	**Settled and Dismissed**	**Top 5 Complainants (number of complaints)**	**Top 5 Defendants (number of complaints)**
2005	12	1	1	1	9	A Telecom (6) APCC (5) Verizon (1)	Tel-America (2) Capsule Communications, Inc. (2) IDT Corp. (1) Operator Communications, Inc. (1) Intelligent Switching & Software/Radiant (1) CommuniGroup of KC, Inc. (1) Centris Information Services (1) PAC-WEST Telecom (1) T-Netix, Inc. (1) Qwest (1)
2006	1	0	-	-	1	Western Payphone Systems (1)	World Communications Group (1)
2007	0	0	-	-	-	-	-

ATTACHMENT B

Informal Payphone Compensation Complaints							
Year	**Total Filed**	**Still Pending**	**Granted**	**Denied**	**Settled and Dismissed**	**Top 5 Complainants (number of complaints)**	**Top 5 Defendants (number of complaints)**
2000	40	0	Under the applicable Commission rules (47 C.F.R. §§ 1.716-1.736), an informal payphone compensation complaint does not result in a Commission resolution on the merits. Rather, the parties settle their dispute (often with Commission staff assistance), or the complainant files a formal complaint.			US West (12) Fort Mill Telecom (9) Lancaster Telephone (9) Rock Hill (9) GTE (1)	BTI (6) Cable & Wireless (5) Sprint (5) Excel (4) MCI (4)
2001	2	0				Qwest (2)	Focal (1) Transcommunication, Inc. (1)
2002	64	0				APCC Services (55) Verizon (8) Qwest (1)	Network IP/NET/NOS (5) Dancris Telecom (3) Verizon (2) ALLTEL (2) AT&T (2) RSL Communications (2) Gateway (2) US Advanced Net (2) ATX (2) CCI (2)
2003	3	0				APCC Services[1] (3)	ARC Networks (1) Telstar (1) Network Enhanced (1)

[1] APCC Services serves as a billing and collections agent representing its numerous member payphone service providers in each complaint.

Informal Payphone Compensation Complaints							
Year	**Total Filed**	**Still Pending**	**Granted**	**Denied**	**Settled and Dismissed**	**Top 5 Complainants (number of complaints)**	**Top 5 Defendants (number of complaints)**
2004	16	0				APCC Services (8) Verizon (5) WBC (1) OCI (1) Bulletins (1)	Tele-America (4) Pac-West (3) Qwest (1) ATX (1) CCL (1) OCI (1) Verizon (1) AT&T (1) One Call (1) Covista (1) OCMC (1)

Informal Payphone Compensation Complaints							
Year	**Total Filed**	**Still Pending**	**Granted**	**Denied**	**Settled and Dismissed**	**Top 5 Complainants (number of complaints)**	**Top 5 Defendants (number of complaints)**
2005	28	0				Western Payphone Systems (15) Bulletins (10) ComTech (1) LittleJohn Communicaitons (1) Nevada Tel (1)	Intelco (3) Acceris Communications Co. (1) Capital Telecommunications(1) T-Netix, Inc. (1) Network Operator Services (1) Midwest Wireless Holdings (1) Shared Communications Services (1) The CommuniGroup of KC (1) Capsule Communications/Covista (1) Long Distance of Michigan (1) Navigator Telecom (1) WesTel, Inc. (1) KDI Distribution, Inc. (1) Korea Telecom America, Inc. (1) International Telecom Exchange (1) KDDI America, Inc. (1) 88 Telecom Corporation (1) Network Enhanced Technology (1) Mpower Communications Co. (1) ITG Services, LLC (1) Next-G Communications, Inc. (1) Novatel, Ltd. (1) Global Network Communications (1) Belmont Telecom, Inc. (1) Transcon Communications (1) Maskina Communications, Inc. (1)

2006	70	27 (16 remain pending at the request of the complainant)		APCC (48) G-Five (10) AT&T (4) Western Payphone Systems (2) Verizon (1) Global Network Communications (1) PayPhones North, Inc. (1) Orion Payphones LLC (1) Superior (1) Rollo Hodgamar & Associates (1)	Compass Global (5) Intelco (4) BAK/Miriam/LATAOne (4) Telefyne (3) NextG (3) Southwest iNet (3) Geo Group (3)
2007	38	24		PBS Telcom (16) C&M (8) G-Five (3) AT&T (3) Pinnacle Public (2) Western Payphones (2)	West Star (5) International Telcom Exchange (2) Global Network Communications (2) Triple Tiger Trading (2) Miriam (2)

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AMICUS CURIAE BRIEF

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P.
and AT&T CORP.,

Petitioners,

v.

APCC SERVICES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* QWEST COMMUNICATIONS CORPORATION IN SUPPORT OF PETITIONERS

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QWEST'S INTEREST

Qwest Communications Corporation ("Qwest") has a direct interest in the outcome of this appeal because Qwest is a defendant in a virtually identical lawsuit brought by respondents APCC Services, Inc. and others (the "respondents"). This Court's ruling will directly affect Qwest's ability to defend respondents' lawsuit.[1]

Qwest is identically situated to petitioners AT&T Corp. ("AT&T") and Sprint Communications Company L.P. ("Sprint"). Like AT&T and Sprint, Qwest is one of the nation's largest providers of long-distance telecommunications services, including toll-free (800-number) services. Since 1996, when the Federal Communications Commission ("FCC") imposed requirements for carriers to pay compensation, Qwest (like AT&T and Sprint) has paid hundreds of millions of dollars in "dial-around compensation" to numerous payphone operators, including customers of respondents. Like AT&T and Sprint, respondents claim that Qwest has failed to pay all of the dial-around compensation required by the FCC's regulations and orders.

On the same day that respondents filed their lawsuit against petitioner Sprint, respondents filed a virtually

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

identical lawsuit against Qwest, captioned *APCC Services, Inc. v. Qwest Communications Corp.*, No. 01-641 (D.D.C. filed Mar. 23, 2001) ("*APCC v. Qwest*").[2] Respondents' lawsuit against Qwest is currently pending before the same judge presiding over Sprint's case in the U.S. District Court for the District of Columbia, and both of these case are proceeding on the same schedule. The District Court ordered AT&T, Sprint, and Qwest to submit joint briefs whenever possible, and all hearings in the case before the Court (and before the Special Master appointed in all three cases) jointly include Qwest, AT&T, and Sprint.

This Court's disposition of this appeal directly affects respondents' case against Qwest. If this Court concludes that respondents lack standing, respondents' case against Qwest would be dismissed along with the respondents' respective cases against AT&T and Sprint. On the other hand, if this Court rules for respondents, the lower court will be bound to follow that ruling, and Qwest will have no realistic opportunity to challenge this Court's ruling in later appeals of the *APCC v. Qwest* case.

For these reasons, Qwest submits this brief as *amicus curiae* in support of petitioners.

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2. The respondents' lawsuit against Qwest, like the one against Sprint, does not include respondent Peoples Telephone Co., Inc. as a plaintiff.

SUMMARY OF ARGUMENT

This Court should not extend constitutional limitations on federal jurisdiction to include the lower courts' new concept of "*place-holder*" standing. The payphone aggregator respondents and their customers, the payphone operators, together manufactured respondents' authority to file these lawsuits. By standing in the operators' shoes, respondents minimized the operators' costs, burdens and risks of litigation, but at the expense of the due process and procedural rights of Qwest and the petitioners.

The payphone operators gain obvious benefits from this arrangement. First, each operator avoids the cost of filing its own lawsuit, and instead only contributes a small share to a litigation fund that finances respondents' lawyers. Second, each operator avoids the burdens of litigation — no operator needs to monitor the lawyers, appear at depositions or trial, or respond to any interrogatories, document requests, or requests for admission. Finally, and most beneficially, the operators face no risks. Whatever monies respondents might win, the operators collect in full; but the operators face no risk of having to satisfy a judgment on the pending counterclaims. In fact, the operators conceivably could renounce adverse court decisions as non-binding.

This contrived arrangement disrupts the careful balance of rights and obligations implemented through the Federal Rules of Civil Procedure. For example, Qwest cannot take meaningful discovery from 1,400 operators scattered across the country, who are the ultimate claimants and who uniquely possess critical

information not known by respondents. Allowing the respondents to proceed with place-holder standing would potentially force Qwest to serve 1,400 Rule 45 subpoenas; even if Qwest could accomplish that feat, it would likely result in satellite litigation nationwide to resolve the inevitable discovery disputes.

Even worse, Qwest is facing a *de facto* class action lawsuit without any court ever issuing a ruling under Rule 23. If the lower courts' rulings stand, a damages case against Qwest could effectively proceed with 1,400 class members, even though there has been no certification that the class meets the mandatory requirements of Rule 23. Such a result would prejudice Qwest and petitioners enormously.

The operators and respondents will rightly argue that one lawsuit resolving all claims, if possible, is preferable to 1,400 separate lawsuits. Yet administrative convenience does not justify departing from well-entrenched Constitutional doctrines and procedural rules. If a single lawsuit is permitted, it should only proceed — if at all — consistent with the requirements and protections contained in the Federal Rules of Civil Procedure.

For these reasons, Qwest respectfully urges the Court to reverse the Court of Appeals.

I. Allowing Respondents To Exercise "Place-Holder" Standing Would Deprive Qwest And Other Defendants Of Significant Procedural Guarantees

Petitioners' Brief ably demonstrates that the law does not recognize respondents' attempted place-holder standing on behalf of their customers, the payphone operators. However, practical considerations should also lead the Court to reject respondents' expansion of legal standing. Respondents will assuredly tout the virtues of their "efficient" lawsuit, but that is an illusion — the universe of disputes between the operators and Qwest cannot be resolved in respondents' suit. First, only the operators, not the respondents, possess critical information without which the claims against Qwest and the petitioners cannot be litigated. Second, the nature of the operators' assignments to respondents prevents Qwest and the petitioners from enforcing judgments on their counterclaims. Litigation nationwide between Qwest and the operators will still be required to resolve all of the issues in the case.

A. Proof of the operators' claims for dial-around compensation turns on threshold issues that the respondents simply do not know and cannot effectively litigate. Qwest is situated identically to petitioners AT&T and Sprint — it is a defendant in one of respondents' dial-around compensation lawsuits subject to the very

same assignments at issue here.[3] Proof of liability (for both the *prima facie* claims as well as Qwest's affirmative defenses) and calculation of damages depend on evidence that is possessed by neither the respondents nor Qwest, but only by the non-party operators. Qwest's ability to defend the respondents' lawsuit would be severely compromised if the respondents are deemed to have standing.

The Court is already familiar with dial-around compensation claims as a result of its consideration of last year's case, *Global Crossing Telecommunications., Inc. v. Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513 (2007). The FCC requires long-distance carriers, such as Qwest and petitioners ("interexchange carriers" or "IXCs"), to pay a default charge for each "completed" toll-free call dialed from each of the operators' payphones. *Id.* at 1518. Although this rule is easily stated, the specifics are exceedingly complex — as reflected by the fact that from 1997 through 2004, the

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3. The respondents' lawsuit against Qwest is not part of this appeal because, for a time, it proceeded on a different path from the respondents' cases against AT&T and Sprint. In 2002, the Judicial Panel on Multidistrict Litigation transferred the *APCC v. Qwest* case to the U.S. District Court for the Central District of California. *In re Qwest Commc'ns Corp. Payphone Serv. Providers Comp. Litig.*, No. 02-ML-1483 (J.P.M.L. Aug. 30, 2002) (order transferring case). In 2006, the case was transferred back to the U.S. District Court for the District of Columbia, but only after AT&T and Sprint had already begun prosecuting the appeal *sub judice*. *In re Qwest Commc'ns Corp. Payphone Serv. Providers Comp. Litig.*, No. 02-ML-1483, 02-CV-7059 (TJH/JWJ) (C.D. Cal. Mar. 6, 2006) (order transferring case). Consequently, Qwest is not a party to this appeal.

FCC issued more than a dozen orders that changed the compensation regime from time to time.[4] Compensation is generally owed by the IXC only if:

- The phone line from which a call is made is actually connected to a payphone;[5]

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4. *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 ("Payphone Docket"), Report & Order, 11 F.C.C.R. 20541 (1996) ("First Report & Order"); Payphone Docket, Order on Reconsideration, 11 F.C.C.R. 21233 (1996); Payphone Docket, Order, 12 F.C.C.R. 16387 (1997) ("Bureau Waiver Order"); Payphone Docket, Second Report & Order, 13 F.C.C.R. 1778 (1997); Payphone Docket, Mem. Op. & Order, 13 F.C.C.R. 4998 (1998) ("Bureau Coding Digit Waiver Order"); Payphone Docket, Mem. Op. & Order, 13 F.C.C.R. 10893 (1998) ("Per-Phone Compensation Waiver Order"); Payphone Docket, Order, 13 F.C.C.R. 7303 (1998) ("Clarification of Per-Phone Compensation Waiver Order"); Payphone Docket, Third Report & Order, 14 F.C.C.R. 2545 (1999); *Bell Atl.-Del., Inc. v. Frontier Commc'ns Servs., Inc.*, File No. E-98-48, Mem. Op. & Order, 16 F.C.C.R. 8112 (2001) ("Bell Atl.-Del. Order I"); Payphone Docket, Second Order on Reconsideration, 16 F.C.C.R. 8098 (2001); Payphone Docket, Third Order on Reconsideration, 16 F.C.C.R. 20922 (2001); Payphone Docket, Fourth Order on Reconsideration, 17 F.C.C.R. 2020 (2002); *Bell Atl.-Del., Inc. v. MCI Telecomms. Corp.*, File No. E-98-49, 17 F.C.C.R. 15918 (2002) ("Granted Joint Request"); Payphone Docket, Fifth Order on Reconsideration, 17 F.C.C.R. 21274 (2002); Payphone Docket, Further Notice of Proposed Rulemaking, 18 F.C.C.R. 11003 (2003); Payphone Docket, Report & Order, 18 F.C.C.R. 19975 (2003); Payphone Docket, Order on Reconsideration, 19 F.C.C.R. 21457 (2004).

5. Bureau Coding Digit Waiver Order, 13 F.C.C.R. at 5017 n.109.

- The payphone owner requests that its local phone company, which provides the phone line, identify the phone line as a payphone line to the IXC;[6]

- No other carrier has a contract with the payphone owner to pay compensation for the call;[7] and

- The payphone owner has not agreed by contract to waive the compensation from a particular IXC.[8]

Respondents do not possess first-hand information about each of these issues. The respondents have about 1,400 customers behind this lawsuit, who in turn collectively operate about a half million payphones. At most, respondents know the phone numbers of these payphones. Respondents do not know what kind of phone is actually connected at the end of each phone line; only the operators know.[9] Respondents do not know what

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6. The FCC requires local phone companies to use certain software that sends codes to the IXCs indicating that the phone lines have payphones. Per-Phone Compensation Waiver Order, 13 F.C.C.R. at 10906 ¶ 22, n.62. Some local phone companies, in turn, have required the operators to ask that the phone lines send these codes.

7. Order on Reconsideration, 19 F.C.C.R. at 21461 ¶ 7.

8. First Report & Order, 11 F.C.C.R. at 20577-78 ¶ 71.

9. Unscrupulous operators have been known to attach regular phones or even computer devices to payphone lines and to use the phones to dial toll-free calls merely to generate false

(Cont'd)

information the operators send to their local phone companies when ordering the phone lines. Respondents often are not parties to the contracts that operators enter into with carriers governing compensation from those particular carriers.[10] Respondents also are not parties

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(Cont'd)

claims for dial-around compensation. To the IXCs such as Qwest, these calls would otherwise look like payphone calls. *See* Payphone Docket, Order on Reconsideration, 11 F.C.C.R. at 21241 ¶ 12 ("The Commission has recognized, since it first addressed the issue of compensation for subscriber 800 calls in 1991, that a PSP could attach an autodialer to a payphone and have it place repeated 800 calls . . . to increase the amount of compensation [it] receives.") (internal quotation omitted); *see also* Henry K. Lee, *San Francisco Celebrity Chef's Son Guilty In Phone Scam*, S.F. Chron., Mar. 11, 2004, at B4 (describing criminal conviction of a customer of respondent APCC who used an autodialer to make more than two million phone calls to 800-numbers from leased payphones, resulting in nearly $500,000 in fraudulent dial-around compensation). Respondents simply do not have first-hand knowledge of what kinds of phones are actually at the end of the phone lines.

10. Qwest became aware of precisely this kind of arrangement between respondent APCC's largest operator-customer, called ETS, and one of Qwest's carrier-customers of Qwest's toll-free services, WCS. ETS agreed that WCS would pay dial-around compensation for certain 800-number calls made from ETS's payphones, even though those calls went through Qwest to get to WCS. Qwest had no knowledge of this agreement for some time and ended up paying $500,000 in compensation to ETS for these calls. Respondent APCC, the aggregator servicing ETS, did not know about this contract either. If no discovery is taken from operators such as ETS, and contracts such as these are not discovered by Qwest, the respondents might obtain compensation from Qwest for these calls even though the operators already have received compensation from other carriers for the same calls — a double-recovery.

to contracts in which the operators agree to waive their rights to compensation, such as in exchange for other services.[11]

Consequently, Qwest cannot take discovery on these central facts without going directly to the operators. However, because the operators are not parties, the normal discovery mechanisms contained in Federal Rules of Civil Procedure 26 through 37 are not available.[12]

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11. Besides toll-free calls, Qwest offers "0+ services" (the service of answering the calls dialed to "0") for payphones. In these contracts, the operators who own the payphones have often waived their right to collect dial-around compensation from Qwest, in exchange for Qwest waiving certain other charges. The issue for the lawsuit is that Qwest's "0+ services" are sold by Qwest through intermediaries, called "agents," who in turn have contractual relationships with the operators of the payphones. Qwest has no doubt that many of respondents' operator-customers have obtained Qwest's "0+ services" from agents who waived Qwest's dial-around compensation. However, Qwest does not have a direct relationship with these operators, so Qwest does not have evidence from the operators that they waived their claims. Respondents have no involvement in these contracts, and thus respondents have no way of providing direct information either.

12. *E.g.*, Fed. R. Civ. P. 26(a)(1)(A) ("a party must, without awaiting a discovery request, provide to the other parties . . ."); Fed. R. Civ. P. 26(a)(1)(C) ("A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference . . ."); Fed. R. Civ. P. 26(a)(2)(A) ("a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705"); Fed. R. Civ. P. 26(a)(3)(A) ("a party must provide to the other parties and promptly file the following information about

(Cont'd)

While discovery pursuant to Rule 45 subpoenas is available, service of subpoenas is hardly realistic on 1,400 operators scattered throughout the country because:

- Qwest would need to obtain service of process information for 1,400 entities;

- Qwest would need to hire process servers to serve 1,400 subpoenas; and

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(Cont'd)
the evidence that it may present at trial other than solely for impeachment"); Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . ."); Fed. R. Civ. P. 26(e) (party has continuing duty to supplement or correct disclosures and responses); Fed. R. Civ. P. 26(f)(1)-(2) ("parties must confer as soon as practicable" to discuss initial disclosures and to develop discovery plan); Fed. R. Civ. P. 27(a)(1) (person who expects to become party may file petition to preserve testimony in any "district where any expected adverse party resides"); Fed. R. Civ. P. 29 (parties may stipulate manner of taking depositions or limiting discovery); Fed. R. Civ. P. 30(b)(1) (deposition of party requires notice, not subpoena); Fed. R. Civ. P. 32(a) (permitting introduction of party's deposition transcript at trial without showing of party's unavailability); Fed. R. Civ. P. 33(a)(1) (permitting service of interrogatories upon party); Fed. R. Civ. P. 35 (permitting physical or mental examination of party whose mental or physical condition is in controversy); Fed. R. Civ. P. 36(a) (permitting service of requests for admissions on another party and providing for admission unless response is served within 30 days); Fed. R. Civ. P. 37(b)(2)(A) (providing for sanctions for party's disobedience of discovery order, including default judgment); Fed. R. Civ. P. 37(c)(1) (party that fails to produce documents or identify witnesses may not rely on those documents or witnesses at trial).

- Qwest would need to set up sites in every judicial district in the country to collect responses from the operators.

These subpoenas become entirely unworkable if the operators raise objections. The operators are typically small companies, doing business in limited localities — meaning that only one or, at most, a few judicial districts would have personal jurisdiction over each operator. Consequently, if hundreds of discovery disputes erupted, Qwest would need to file miscellaneous enforcement actions in federal courts throughout the country. District court and magistrate judges around the country would hear the same disputes over and over. Besides the sheer magnitude of the effort, inconsistent results are inevitable.

Creative, informal solutions have not succeeded. Petitioner AT&T attempted to take discovery from respondents about information the payphone operators possessed. Respondents' initial response was that they did not possess much of the information AT&T sought, and had no intention of contacting the operators to obtain it. *See* Plaintiffs' Response to AT&T's Motion to Compel at 7-10, *APCC Servs., Inc. v. AT&T Corp.*, No. 1:99cv00696 (D.D.C. July 8, 2002) ("Plaintiffs should not and cannot be compelled to collect additional information they do not and would not normally possess from the PSPs in the course of acting as an aggregator."). The Special Master presiding over the case ordered respondents to produce the information; the respondents responded by sending informal questionnaires to the operators. *See APCC Servs., Inc. v. AT&T Corp.*, No. 1:99cv00696 (D.D.C. July 31, 2002) (Memorandum and

Order No. 5 granting motion to compel). That effort was a complete failure. More than half the operators failed to respond. Those that did seemed uninterested in or incapable of providing full and complete responses. AT&T received comments such as "I am at a complete loss as to what to do with these 'request documents' so I obviously have nothing to add!;" "I will be reviewing the packet if I find the time, otherwise use this as your authority to replicate your response in our name;" and "does not wish to respond further to the AT&T Interrogatories."[13] AT&T Corp.'s Memorandum in Support of Its Motion to Compel Compliance with Order No. 5 at 6, *APCC Servs., Inc. v. AT&T Corp.*, No. 1:99cv00696 (D.D.C. Nov. 27, 2007).

Respondents stand in the shoes of their operator-customers in name only. Respondents are not the functional equivalents of their customers; they lack the first-hand knowledge necessary to litigate all of the issues that arise from these claims.

B. In addition to the prospect of pursuing multiple nationwide enforcement actions, Qwest would also face nationwide lawsuits to enforce judgments on its counterclaims.

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13. Other operators clearly misunderstood the intent of the informal discovery and responded only with comments directed to the respondents such as "agree with APCC's stance," "I approve of the way you are handling the litigation," and "please count me in." AT&T Corp.'s Memorandum in Support of Its Motion to Compel Compliance with Order No. 5 at 6, *APCC Servs., Inc. v. AT&T Corp.*, No. 1:99cv00696 (D.D.C. Nov. 27, 2007).

Qwest has alleged that it *overpaid* compensation to many, if not all, of the operators, and has asserted counterclaims to recoup these overpayments. Qwest has identified several reasons for this overcompensation. For example, until late 2001, Qwest was paying compensation for calls that were "incomplete" under the FCC's definitions, and for which no compensation was owed.[14] Qwest believes this caused overpayments of millions of dollars. In 2002 through 2004, Qwest paid compensation for certain calls that turned out not even to be toll-free, resulting in a $6.1 million overpayment. In addition to these examples, it is also possible that Qwest overpaid compensation for lines that did not have payphones, or where the operators agreed with third-party

14. This problem arises in the context of what are called "platform" calls, which constitute a significant percentage of Qwest's toll-free traffic. When a toll-free call is made using a prepaid calling card or a credit card, the call passes through a device called a "platform" in which typically a computer-activated voice asks the caller to type in a PIN or credit card number and then enter the phone number of the person that the caller is attempting to reach. *See* Payphone Docket, Report and Order, 18 F.C.C.R. at 19988-89 ¶ 29. The FCC does not define this call as "complete" until the person being called actually answers the phone, even though in a sense the platform has "answered" the call first. *See id.* at 19984-85 ¶ 21. Qwest's computer systems were counting many of the calls as completed because the platforms answered the calls, which ultimately proved to be an insufficient basis to deem the calls completed. The problem arose because Qwest did not know which calls were going to platforms, where the toll-free numbers were used by Qwest's carrier-customers and resold by these customers to calling card services. Qwest's inability to discern which platform calls were actually completed presents a significant problem. Call-completion rates of calls through platforms vary from 70% to as low as 5% for certain international destinations such as India.

carriers that the carriers, not Qwest, would pay the compensation. These are all issues that would have to be identified through the discovery outlined above.

It is reasonably likely that Qwest will prevail on some portion of its counterclaims because it overpaid the operators. In this event, Qwest will be entitled to enforce a judgment for the overpayment. However, the named plaintiffs — the respondents — would not satisfy these judgments, and have no money to do so, since the dial-around compensation Qwest pays is passed through to the operators each quarter.

Nor have the operators agreed to pay the liability of any counterclaims in the lawsuit. The operators assigned to respondents the right to file claims, with the promise that the respondents would pass through all amounts *collected* in the lawsuits. Pet. App. 117-118. The assignments do not recognize the possibility that the operators would have liability, and the assignments make no provision for an outcome in which counterclaims result in a judgment. Indeed, the assignments do not even state that the operators agree to be bound by the results of any trial. Moreover, if any of the operators believe that the case is not going well for them, they could simply cease funding the respondents' litigation effort, in which case those operators would be released from the lawsuit entirely. Pet. App. 119-120.

If so, Qwest would have to institute actions in virtually every federal judicial district against the operators to enforce the judgments on the counterclaims. The operators might well disavow the results of the

respondents' trial and might argue that neither issue preclusion nor claim preclusion applies because they were not parties to the respondents' lawsuit. This would give operators, in essence, a "free ride" in the instant case. Indeed, there is already precedent for this in the litigation, as explained below. Depending on how multiple judges resolve those issues, Qwest might have the unfortunate choice of relitigating the claims entirely, or simply abandoning its counterclaims for lack of collectibility.

This is a no-win situation for Qwest, brought about by the unnatural place-holder standing that respondents and their operator-customers have crafted. While the administrative convenience of the respondents' consolidated suit works to the operators' benefit, it requires Qwest either to (1) forgo discovery on critical issues and forgo collection of its counterclaims, or (2) manage multiple actions all across the country. The respondents' place-holder standing is simply not beneficial to the courts nor the defendants.

II. Respondents And Operators' Concerns About The Inconvenience Of Multiple Lawsuits Are Best Resolved Through Existing Civil Procedures

Unquestionably, a single lawsuit — *if federal law permits one to be maintained at all* — is superior to 1,400 actions around the country. However, the lower courts' creation of place-holder standing is not the solution, for all the reasons described above. Fortunately, the civil rules *do* contemplate the aggregation of hundreds of claims into a single lawsuit — through class action procedures contained in Rule 23. If the operators'

claims can be collected into a single lawsuit, it should be done through the procedural protections and guarantees of Rule 23, but respondents and the operators have chosen to avoid Rule 23.

A. This lawsuit is a *de facto* class action, bearing all of its hallmarks. A small number of named plaintiffs are pursuing claims on behalf of a class of 1,400 separate claimants. Respondents argue that Qwest's internal procedures and computer programs systematically failed to track all of the calls for which compensation allegedly was owed. Respondents have even argued, in their effort to seek "associational" standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), that their claims do not require the participation of the operators. Brief of Appellees at 36, *APCC Servs., Inc. v. Sprint Commc'ns Co.*, No. 04-7034 (D.C. Cir. Aug. 18, 2004). Any class representative seeking certification under Rule 23(b)(3) would make this same argument.

Congress and the federal courts have constructed important procedural safeguards to ensure that class actions proceed only if mandatory requirements are met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'") (quoting 28 U.S.C. § 2072(b)); Fed. R. Civ. P. 23 advisory committee's notes (Rule 23 amended into modern form because "the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness"). Even though a single lawsuit might be more efficient, in many cases it

is inappropriate because the nature of claims and defenses necessitates that individual suits be filed — even if that requires thousands of lawsuits. *See Amchem Prods.*, 521 U.S. at 597, 626 (denying certification of class of "hundreds of thousands, perhaps millions" for settlement purposes because "[i]n significant respects, the interests of those within the single class are not aligned"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079, 1090 (6th Cir. 1996) (class of 12,000 to 15,000 alleged members decertified where plaintiff established numerosity requirement of Rule 23 but no other requirements).

None of the procedural protections inherent in Rule 23 has been addressed here. The District Court has never decided any motions under Rule 23 in respondents' lawsuit; respondents have never been forced to demonstrate that the mandatory requirements of Rule 23 are present. *See General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied"); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006) ("It would seem to be beyond dispute that a district court may not grant class certification without making a determination that all of the Rule 23 requirements are met.").

Respondents have avoided this approach because it is doubtful that this case could ever be certified as a class action. First, the mandatory requirement of "typicality" in Rule 23(a)(3) is not met because respondents do not possess a "claim" of their own and thus are not "typical" of the class. *East Tex. Motor Freight Sys. Inc. v.*

Rodriguez, 431 U.S. 395, 403 (1977) ("As this court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.") (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). Second, class certification under Rule 23(b)(3) is far from assured given the individualized issues for particular operators described in Part I.A above. *See* Fed. R. Civ. P. 23(b)(3); *Amchem Prods.*, 521 U.S. at 622.

But this Court need not decide if a district court would have certified a class. The existence of competing arguments under Rule 23 demonstrates that a district court should hear operators' claims in a putative class action and then decide whether a class action is appropriate. Respondents and their operator-customers chose to forgo a class action and instead to pursue these claims through place-holder standing. This unilateral choice short-circuits the protections of Rule 23. If the Court affirms the lower courts, a new hole will have been created in Rule 23. Class-action advocates could obtain assignments from putative class members and avoid a court's scrutiny of Rule 23 requirements.

B. The respondents and operators are no strangers to the concept that they might have pursued these claims in a putative class action. They tried to do so, but abandoned the effort when it became tactically undesirable for them.

In June 2003, six of the respondents' operator-customers filed their own lawsuit against Qwest for the very same dial-around compensation claims at issue in

the respondents' case. *D&B Tel. Co. v. Qwest Commc'ns Corp.*, No. 03-01443 (D.D.C. filed June 30, 2003). The lawsuit was styled as a putative class action on behalf of a class of all operators whose claims were at the time at issue in the respondents' lawsuit. These six operator-plaintiffs characterized their lawsuit as "protective," in the event that respondents here were ultimately found to lack standing. The filing of the operators' putative class action lawsuit was no coincidence or independent prosecution of the claims; the very same counsel for respondents represented the operator-plaintiffs in the class action lawsuit. It was a coordinated strategy.

The operator-plaintiffs attempted to certify a class consisting of all of the operators whose claims are at issue in respondents' case against Qwest. In 2003 and 2004, shortly after the operators' lawsuit was filed, the six operator-plaintiffs moved for class certification. Qwest opposed the motion, and the matter was fully briefed and submitted for the District Court's ruling. However, the motion was never decided because procedural developments interrupted its consideration. The case was effectively stayed by the appellate court's opinion that no private right of action existed for dial-around compensation claims.[15] The operators' claims against

15. The operators' case, like the respondents' case against Qwest, was transferred back to the original District Court in the District of Columbia in 2006. *In re Qwest Commc'ns Corp. Payphone Serv. Providers Comp. Litig.*, No. 02-ML-1483, 02-CV-7059 (TJH/JWJ) (C.D. Cal. Mar. 6, 2006) (order transferring case). At the time of the transfer back to Washington, D.C., the D.C. Circuit had already ruled that no private right of action

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Qwest were revived by this Court's opinion last year in *Global Crossing*, which held that the Communications Act provides a private right of action to operators of payphones for "dial-around compensation." 127 S. Ct. at 1518.

Instead of promptly litigating their case, the operator-plaintiffs — acting together with the respondents — reversed course and abandoned the class action lawsuit. Even further, the operators and respondents told the District Court that it had lacked subject-matter jurisdiction over the operators' lawsuit *from the outset*. In a brief to the D.C. District Court filed four months ago, counsel for respondents (who also represent the operators) argued that the "exclusive" and "irrevocable" assignments of the operators' claims to the respondent-aggregators deprived the operators of authority to file their own lawsuit. Operators and respondents concluded that federal court lacked subject-matter authority over the operators' lawsuit because they lacked their own right to pursue the claims when the case was filed. Plaintiffs' Opposition to Motion to Dismiss at 23-24, 24 n.17, *APCC v. Qwest* (Oct. 9, 2007) ("Pls.' Opp.").

The operators' decision to abandon their putative class action lawsuit was purely tactical. Qwest had prevailed on a motion which greatly reduced the

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existed for dial-around compensation claims. *See APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238 (D.C. Cir. 2005), *vacated and remanded*, 127 S. Ct. 2094 (2007). Respondents had already petitioned this Court for a writ of *certiorari* concerning the D.C. Circuit's opinion. Consequently, with no cause of action then in existence, the operators' lawsuit was effectively stayed pending the outcome of the respondents' appeal.

operators' claims to a shorter time period than the claims pending in respondent's case against Qwest. *D&B Tels., Inc. v. Qwest Commc'ns Corp.*, No. 03-CV-05942 (TJH/JWJ) (C.D. Cal. Apr. 6, 2004) (order granting motion to dismiss).[16] Because this reduced operators' potential damages by *tens of millions of dollars*, the operators and respondents disavowed the case and declared it void from the outset (despite operator-plaintiffs' earlier statements that they possessed claims "typical" of other class members). Pls.' Opp. at 23-25. This sequence of events demonstrates that respondents and operators repeatedly shift arguments as they attempt to lodge their claims in the most tactically favorable forum.

The operators should not be rewarded for their efforts to obtain a *de facto* class action without ever having a court rule on a Rule 23 motion. The respondents' manufactured place-holder standing is an inappropriate end-run of Rule 23, and this Court should reject it.

C. The respondents often confuse administrative and business convenience with Constitutional and prudential limits on federal court standing. Before the lower courts, respondents asserted that their operator-customers are small businesses that cannot individually afford to battle behemoths such as petitioner AT&T. Respondents also noted that the FCC has long recognized respondent-aggregators' valued role in providing billing and collection services for payphone

16. The respondents' claims against Qwest extend to dial-around compensation paid for calls from October 1, 1998 to the present. As a result of the district court's ruling, the operators' claims against Qwest only extend to calls from January 1, 2001 to the present.

operators. Each of these points is misleading, however. That respondents provide a valuable service to their customers, or that the FCC's orders have blessed the respondents' role in their industry, does not alter the standing analysis. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) ("An interest unrelated to injury in fact is insufficient to give a plaintiff standing."). Nor does the smaller size of individual operators give license to avoid well-established limitations on standing. *See Raines v. Byrd*, 521 U.S. 811, 820 (1997) (Constitution requires this Court to "put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed inj[illegible] is personal, particularized, concrete, and otherwise judicially cognizable."); *see also Miller v. Albright*, 523 U.S. 420, 448 (1998) (O'Connor, concurring) ("Those [standing] requirements were adopted to serve the institutional interests of the federal courts, not the convenience of the litigants."). Indeed, the operators are not always the smallest parties in their lawsuits. By aggregating their 1,400 claims in one case, the operators and respondents have pursued claims against very small defendants, such as small carriers. *See, e.g.*, *APCC Servs., Inc. v. NetworkIP, LLC*, 22 F.C.C.R. 4286 (2007).

Qwest's experience directly refutes the notion that respondents are the only entities capable of maintaining dial-around compensation lawsuits. A small operator in Utah pursued approximately twenty lawsuits against all of the major long-distance carriers, including AT&T,

Sprint, and Qwest.[17] Another group of approximately twenty operators on the West Coast, many of them very small entities or one-person companies, filed individual lawsuits against Qwest, often in state court.[18] The court

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17. *Flying J Inc. v. Comdata Network*, No. 96-0066 (D. Utah filed July 1, 1996); *Flying J Inc. v. AT&T Commc'ns*, No. 98-0096 (D. Utah filed Aug. 18, 1998); *Flying J Inc. v. MCI Worldcom Commc'ns*, No. 99-0110 (D. Utah filed Oct. 1, 1999); *Flying J Inc. v. Sprint Commc'ns*, No. 99-0111 (D. Utah filed Oct. 1, 1999); *Flying J Inc. v. Global Crossing*, No. 99-0125 (D. Utah filed Nov. 10, 1999); *Flying J Inc. v. Cable & Wireless USA*, No. 99-0128 (D. Utah filed Nov. 15, 1999); *Flying J Inc. v. Bus Telecom*, No. 99-0130 (D. Utah filed Nov. 16, 1999); *Flying J Inc. v. Qwest Commc'ns*, No. 00-0023 (D. Utah filed Mar. 16, 2000); *Flying J Inc. v. Westel Inc.*, No. 00-0029 (D. Utah filed Mar. 27, 2000); *Flying J Inc. v. Birch Telecom*, No. 00-0032 (D. Utah filed Mar. 31, 2000); *Flying J Inc. v. Excel Teleco*, No. 00-0033 (D. Utah filed Mar. 31, 2000); *Flying J Inc. v. Advanced Commc'ns Group*, No. 00-0044 (D. Utah filed Apr. 17, 2000); *Flying J Inc. v. Logix Commc'ns Entm't.*, No. 00-0054 (D. Utah filed May 17, 2000); *Flying J Inc. v. Ceridian*, No. 00-0135 (D. Utah filed Nov. 15, 2000); *Flying J Inc. v. Eclipse Teleco*, No. 03-0090 (D. Utah filed Aug. 6, 2003); *Flying J Inc. v. TA Operating*, No. 04-0177 (D. Utah filed Dec. 20, 2004); *Flying J Inc. v. TA Operating.*, No. 06-0030 (D. Utah filed Feb. 27, 2006).

18. *Bischoff v. Qwest Commc'ns Corp.*, Nos. 02-0934, 02-7670 (C.D. Cal. removed Sept. 6, 2002); *Bischoff v. Qwest Commc'ns Corp.*, No. 02-0698 (C.D. Cal. removed July 11, 2002); *Greene v. Qwest Commc'ns Corp.*, No. 02-0646 (C.D. Cal. removed July 11, 2002); *Precision Pay Phones v. Qwest Commc'ns Corp.*, No 02-3243 (N.D. Cal. removed July 8, 2002) *Parsons v. Qwest Commc'ns Corp.*, 02-5171 (C.D. Cal. removed June 28, 2002); *Schweikert v. Qwest Commc'ns Corp.*, Nos. 02-3123, 02-3124 (N.D. Cal. removed June 28, 2002); *Brooks v. Qwest Commc'ns Corp.*, No. 02-8272 (C.D. Cal. removed May 31, 2002); *General Comm'n Servs. v. Qwest Commc'ns*

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system provided an appropriate vehicle for litigating these claims, and the operators were hardly disadvantaged against Qwest. Qwest removed all of the cases to federal court because they asserted claims under the FCC's regulations, and then the Judicial Panel on Multidistrict Litigation transferred all of the cases to a single court for coordinated pretrial activities.[19] The parties began discovery on the merits of the claims, without having to deal with thorny questions of place-holder standing or even Rule 23 issues. The lawsuits settled on mutually acceptable terms.

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Corp., Nos. 02-4304, 02-4306 (C.D. Cal. removed May 31, 2002); *Parsons v. Qwest Commc'ns Corp.*, Nos. 02-4312, 02-4316, 02-4318 (C.D. Cal. removed May 31, 2002); *Nevada Tel., Inc. v. Qwest Commc'ns Corp.*, No. 02-0742 (D. Nev. removed May 24, 2002); *Pimentel v. Qwest Commc'ns Corp.*, No. 02-1540 (N.D. Cal. filed Mar. 29, 2002); *Greene v. Qwest Commc'ns Corp.*, No. 02-0501 (C.D. Cal. removed May 23, 2002); *Tauney v. Qwest Commc'ns Corp.*, No. 02-0827 (C.D. Cal. removed Jan. 28, 2002); *Precision Pay Phones v. Qwest Commc'ns Corp.*, Nos. 02-0201, 02-0213, 02-0215 (N.D. Cal. removed Jan. 11, 2002); *Metrophones Telecomms., Inc. v. Qwest Commc'ns Corp.*, No. 01-1850 (W.D. Wash. filed Nov. 15, 2001); *Greene v. Qwest Commc'ns Corp.*, Nos. 01-0952, 01-0953 (C.D. Cal. removed Oct. 12, 2001); *Bay Distrib. Serv., Inc. v. Qwest Commc'ns Corp.*, Nos. 01-20937, 01-20942 (N.D. Cal. removed Oct. 2, 2001); *PBS Telecom, Inc. v. Qwest Commc'ns Corp.*, No. 01-7285 (C.D. Cal. removed Aug. 21, 2001); *Lee v. Qwest Commc'ns Corp.*, No. 01-1578 (E.D. Cal. removed Aug. 14, 2001); *Littlejohn v. Qwest Commc'ns Corp.*, No. 01-6033 (C.D. Cal. removed July 11, 2001); *Wolfe v. Qwest Commc'ns Corp.*, Nos. 01-5554, 01-5557 (C.D. Cal. removed June 22, 2001); *Flying J, Inc. v. Qwest Commc'ns Corp.*, No. 00-0023 (D. Utah filed Feb. 7, 2000).

19. *In re Qwest Commc'ns Corp. Payphone Serv. Providers Comp. Litig.*, No. 02-ML-1483 (J.P.M.L. Aug. 30, 2002) (transfer order).

Therefore, reversal of the Court of Appeals will not doom the ability of operators to sue for future dial-around compensation, if they believe they have claims. But the respondents' and operators' convoluted experiment with place-holder standing should draw to a close.

CONCLUSION

For these reasons, Qwest joins petitioners and respectfully submits that the Court should reverse the Court of Appeals.

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